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IN THE
Supreme Court of the United States

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondents.

**On Writ Of Certiorari To The
Supreme Court Of Illinois**

**Petition For Certiorari Filed November 19, 1971
Certiorari Granted April 3, 1972**

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ORDER OF CIRCUIT JUDGE DAHL

Lake Shore Auto Parts Co. v. Korzen, et al., Case Number 70 CH 5123 (March 30, 1971).

This cause coming on to be heard upon the Motion for Summary Judgment of **LAKE SHORE AUTO PARTS CO.**, an Illinois corporation, plaintiff, by and through its attorneys, **ORLIKOFF, PRINS, FLAMM & SUSMAN**, and upon the Cross-motion For Summary Judgment of defendant **ROBERT J. LEHNHAUSEN**, Director, Department of Local Government Affairs of the State of Illinois, by and through the Attorney General of Illinois, and the Cross-motion For Summary Judgment of defendants **KORZEN, KEANE, SEMROW, CULLERTON** and **BARRETT**, assessing and taxing officials of Cook County, by and through the State's Attorney of Cook County,

The Court having examined the pleadings and memoranda filed by the parties hereto, having heard the arguments of counsel and being fully advised in the premises

DOES HEREBY FIND:

1. That there is no genuine issue as to any material fact in this cause, and it is therefore appropriate and proper that the cause be determined on the Motion and Cross-motions For Summary Judgment.

2. That the plaintiff, **LAKE SHORE AUTO PARTS CO.**, is a corporation duly organized and existing under the laws of Illinois, and on April 1, 1970, was the owner of personal property having a taxable situs in the County of Cook, which property has been included on the assessment role now being prepared by the assessing officials of Cook County for the tax year 1970; that the plaintiff has standing to bring this action on its own behalf, and it is not at this time necessary or appropriate to determine whether the action is properly brought and maintained as a class action or to determine the definition of the plaintiff class.

3. That an amendment to the Illinois Constitution of 1870, designated as Article IX-A, was approved by the people of Illinois at a referendum held on November 7, 1970, and such amendment, by its terms, became effective January 1, 1971; that said Article IX-A purports to prohibit the taxation of personal property by valuation as to "individuals", and only as to "individuals", while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, §482 et seq.) which impose such personal property taxes as to property owned by corporations and other "non-individuals".

4. That said Article IX-A is self-executing, and the necessary effect of the adoption thereof is to amend the various provisions of the Revenue Act of Illinois, specifically including but not limited to §18 thereof (Ill. Rev. Stat. 1969, ch. 120, §499), so as to exempt from personal property taxes thereby imposed all personal property owned by "individuals", while retaining such taxes as to personal property owned by corporations and other "non-individuals."

5. That the Revenue Act of Illinois, as so amended by Article IX-A of the Illinois Constitution, deprives the plaintiff corporation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States: that said Revenue Act of Illinois, to the extent that it purports to impose personal property taxes with respect to the property owned by plaintiff, is therefore unconstitutional, void and of no effect whatsoever.

6. That Article IX-A of the Illinois Constitution is not applicable with respect to personal property taxes imposed by the Revenue Act of Illinois for the year 1970, the as-

ORDER OF CIRCUIT JUDGE THOMAS DONOVAN

Shapiro, et al v. Barrett, et al., Case Number 71 L 5745
(May 27, 1971).

This cause appears before this Court on plaintiffs' Complaint for Declaratory Judgment, filed pursuant to Chapter 110, Section 57.1 of the Civil Practice Act. The action was filed by plaintiffs for themselves and in a representative capacity on behalf of all other persons similarly situated. The cause comes on for hearing on separate motions, to strike and dismiss that complaint, filed by County and State defendants. Defendants have elected to stand on their motions.

No genuine issue as to any material fact emerges.

The plaintiffs are:

1. Clemens K. Shapiro, is a natural person, citizen and taxpayer of the State of Illinois, resident of and a salaried employee in the County of Cook wherein he owns personal property in his own name, and owns real property jointly with his wife, none of which property is owned or used in the operation of, or for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family.
2. Jerome Herman, is a natural person, and a citizen of the State of Illinois, and as sole proprietor owns, operates and conducts a business located in Cook County, Illinois, and is the owner of property and a taxpayer herein.
3. Guy S. Ross and Eugene D. Ross, natural persons, citizens and residents of the State of Illinois, both

of whom are partners, and as partners operate and conduct a business as a partnership duly organized under the laws of the State of Illinois, which business entity is located in the County of Cook and is the owner of property and a taxpayer therein.

4. M. Weil and Sons, Inc., a corporation duly organized and existing under the laws of the State of Illinois, is located in, and is the owner of property situated in the County of Cook and a taxpayer therein.

Each of the plaintiffs is an owner of property subject to the ad valorem tax directed to be imposed by Article IX of the Illinois Constitution of 1870, and imposed by the Illinois Revenue Act of 1939, which property has been assessed by valuation and continues to be so assessed by defendants pursuant to that constitutional and statutory authority.

The electorate of this State, on November 3, 1970, adopted amending Article IX-A to the Illinois Constitution of 1870. This amendment became part of the Illinois Constitution on November 25, 1970, and reads as follows:

"Article IX-A

TAXATION OF PROPERTY

§ 1. Taxation of personal property prohibited

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*"

"SCHEDULE

"Paragraph 1. This amendment shall become effective January 1, 1971."

Plaintiffs contend as follows:

All plaintiffs contend that Illinois Constitution of 1870, as amended by the addition of Article IX-A, specifically prohibits, and declares to be unconstitutional the imposition, in Illinois, of the property taxes imposed by Article IX, Section 1, on *all* forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner.

All plaintiffs contend that if Article IX-A does not prohibit the taxation of all property, then Article IX-A prohibits the tax to be measured by the value of the property taxed.

All plaintiffs contend that the prohibition of Article IX-A, which abolishes the imposition of property tax measured by valuation of the property taxes, extends to those taxes so measured where the assessment of plaintiffs' property has been commenced by defendants prior to, even though not completed on January 1, 1971, the effective date of Article IX-A, and payment due thereafter.

Natural Persons contend that:

The designation "individuals" in Article IX-A properly and validly describes, is intended to apply, and does apply solely to them; and the taxation by valuation prohibited in Article IX-A, if not applicable to all property owned by them, is applicable to personal property owned by them and used by them for their personal purposes; and that,

Article IX-A prohibits taxation, by valuation of personal property as to them alone, while denying that prohibition as to all others, is proper, valid, and constitutional under both Illinois Constitution and the Constitution of the United States.

Both business entities and corporations contend that:

Article IX-A, effective January 1, 1971, as an amendment to Illinois Constitution of 1870 is offensive to the Constitution of the United States.

If the designation "individuals" in Article IX-A invokes prohibition of taxes by valuation on personal property exclusively as to "natural persons" and personal property owned by them, but denies the same prohibition to business entities and corporations, then such classification is discriminatory, unreasonable and offensive both to Illinois Constitution and the Constitution of the United States. This is true for the reasons that such classification is invalidly predicated upon purported differences between *users* of identical property and the *use* to which that property is put, instead of differences found to exist between the forms of the property upon which that tax is directly laid. The employment of such base constitutes special legislation prohibited by Article IV, Section 22 of Illinois Constitution, as well as denying to business entities and corporations due process of law and the equal protection of the law guaranteed to them by Article II, Section 2 of the Illinois Constitution, and the Fourteenth Amendment to the Constitution of the United States.

Unless the exclusion of property owned by "individuals" is construed to exclude the property of business entities and corporations, as well as that of natural persons, then the employment in Article IX-A of the term "individuals" is so vague, uncertain, and incapable of definitive application to the context of Article IX, that Article IX-A must fall because it is totally absent the comprehension required, especially of constitutional provisions, by both Illinois Constitution and the Constitution of the United States.

Business entities contend that:

(a) The designation "individuals" in Article IX-A is correctly and properly described, and is intended to apply to, and does include business entities which own property because the natural person owners of that business en-

tity are personally and individually liable for the payment of that tax.

Article IX-A prohibiting taxation by valuation of property owned by such business entities, while denying that prohibition as to corporations is proper, valid and constitutional under both Illinois' Constitution and the Constitution of the United States.

Corporations contend that:

If the designation "individuals" in Article IX-A applies to any or all owners of property except corporate owners of property, then such classification is discriminatory, unreasonable, and offensive to both the Illinois Constitution and the Constitution of the United States.

Defendants contend that the taxation by valuation of real property and other property, as provided in Article IX shall continue and remain, in all regards, unaffected by Article IX-A; however:

Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited only as to natural persons; but as to them, only as to the personal property owned by them; but as to that personal property owned by them, only such of that property which is used by them for the personal enjoyment of themselves and their families.

This matter appearing on the pleadings aforesaid, presenting the issues to this Court as delineated by those pleadings, and the Court having heard arguments by all parties in support of their respective positions, **THIS COURT FINDS:**

1. That a genuine cause and controversy exists, and that this action is properly maintained under the provisions of

Chapter 110, Section 57.1 (Declaratory Judgments), Civil Practice Act, Illinois Revised Statutes, 1969.

2. Each of these plaintiffs has standing to bring this action in his or its own behalf and is a proper representative of his class.

3. That this action is properly maintained as a class action, and the members of those classes are adequately and competently represented by counsel herein.

4. That Article IX-A of the Illinois Constitution of 1870 is valid, constitutional and immune to all of the plaintiffs' assaults, both under the Illinois Constitution and the Constitution of the United States.

5. That Article IX-A is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families.

6. That these findings by this Court make it unnecessary to consider contentions made by plaintiffs in the alternative.

7. That all issues as found heretofore are found in favor of the defendants, except as to those issues relating to the plaintiff Clemens K. Shapiro and members of his class involving personal property owned and used by them for the personal enjoyment of themselves and their families.

8. That motions to strike and dismiss plaintiffs' Complaint are sustained in regards and in respect of those found in favor of the defendants, except as to those issues raised by plaintiff Clemens K. Shapiro and members of his class involving personal property owned and used by

them for the personal enjoyment of themselves and their families.

9. Pursuant to Rule 304(a) of the Rules of the Supreme Court of Illinois, the Court expressly finds that there is no just reason for delaying enforcement or appeal of this Order. In the event of an appeal from this Order, the Court is of the opinion that the interests of justice would be best served by hearing and deciding the appeal as expeditiously as possible because of the manifest public importance of the issues and the substantial amount of tax revenues that are involved.

WHEREFORE, IT IS ORDERED, ADJUDGED and DECREED that defendants' motions to strike and dismiss are sustained as to all plaintiffs, except the plaintiff Clemens K. Shapiro and members of his class, and plaintiffs' Complaint is stricken as to all issues and in all regards and respects contrary to and in variance with the judgment of this Court; that Amending Article IX-A of the Illinois Constitution is valid and constitutional in all respects and is immune to attack under any provision or provisions of the Illinois Constitution of 1870 and the United States Constitution, and that said Amending Article IX-A declares its prohibition exclusively as to any personal property tax on the personal property owned by individuals and used for their personal enjoyment and that of their families.

ENTER:

THOMAS C. DONOVAN,
Presiding Judge, Tax Division,
Circuit Court of Cook County,
Illinois.

Date: May 27, 1971

OPINION OF THE SUPREME COURT OF ILLINOIS

(July 19, 1971)

LAKE SHORE AUTO PARTS CO.,
an Illinois Corporation, et al.,

Appellees,

v.

BERNARD J. JORZEN, County
Treasurer and ex officio County Col-
lector of Cook County, et al.,

Appellants.

EUGENE L. MAYNARD, et al.,

Plaintiffs,

v.

EDWARD J. BARRETT, County
Clerk of Cook County, et al.,

Defendants.

CLEMENS K. SHAPIRO, et al.,

Appellants,

v.

EDWARD J. BARRETT, County
Clerk of Cook County, et al.,

Appellees.

Nos. 44199, 44308,
44432 Cons.

Mr. JUSTICE SCHAEFER delivered the opinion of the court.

These consolidated cases present issues concerning the construction and the validity of Article IX-A which was added to the Constitution of 1870 by referendum vote at the November 1970 election. On June 30, 1969, the Senate and the House of Representatives concurred in the

adoption of Senate Joint Resolution No. 30, which provided for the submission of the proposed amendment to a referendum vote. Senate Joint Resolution No. 30 (Senate Journal, June 30, 1969, p. 3476) is as follows:

SENATE JOINT RESOLUTION NO. 30

Resolved, By the Senate of the Seventy-sixth General Assembly of the State of Illinois, the House of Representatives concurring herein, that there shall be submitted to the electors of the State for adoption or rejection at the next election of members of the General Assembly of the State of Illinois, in the manner provided by law, a proposition to add Article IX-A to the Constitution, the added Article to read as follows:

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971.

The explanation of the amendment which appeared upon the referendum ballot is as follows:

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions in Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

Subsequently, on May 19, 1970, the Senate adopted Senate Joint Resolution No. 67 (Senate Journal May 19, 1970,

p. 6) which contained a further statement of the intention of the General Assembly in adopting Senate Joint Resolution No. 30. Senate Joint Resolution No. 67 was concurred in by the House of Representatives on May 29, 1970 (Senate Journal May 29, 1970, p. 149). It reads as follows:

Senate Joint Resolution No. 67

RESOLVED, BY THE SENATE OF THE SEVENTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that, in adopting Senate Joint Resolution No. 30, which submits to the electors of this State a constitutional amendment prohibiting the taxation of personal property by valuation as to individuals, it was the intention of this General Assembly to abolish the ad valorem taxation of personal property owned by a natural person or by two or more natural persons, and that, by the use of the phrase "as to individuals", this General Assembly intended to mean a natural person, or two or more natural persons as joint tenants or tenants in common.

The first of the three consolidated actions that are before us was filed by Lake Shore Auto Parts Co., a corporation, on December 9, 1970. The complaint named as defendants the county clerk of Cook County, the county assessor, the county collector and the members of the board of appeals of that county, as well as the director of the Department of Local Government Affairs of the State. It alleged that it was filed as a class action on behalf of the plaintiff (hereafter Lake Shore) and on behalf of all other corporations and other "non-individuals" subject to personal property tax. It asserted that the new Article IX-A violates the fourteenth amendment to the Constitution of the United States because its effect "is to

exonerate from ad valorem personal property taxation, on and after January 1, 1971, all personal property owned by 'individuals', while authorizing and requiring the continued ad valorem taxation of all personal property owned by entities other than 'individuals.' " It also alleged that the provisions of Article IX-A immediately became a part of and amended the Revenue Act of 1939, so that that statute "imposes ad valorem taxes only with respect to personal property owned by corporations and other entities which are not 'individuals' within the meaning of said Article IX-A." The complaint prayed for a decree "finding and declaring that the provisions of the Revenue Act of 1939 * * *, as amended by Article IX-A of the Constitution of Illinois, are unconstitutional, invalid and unenforceable insofar and to the extent that such statute purports to impose ad valorem taxes with respect to personal property owned by plaintiff and all corporations and other 'non-individuals' who are members of the class which plaintiff represents." An injunction, as well as relief appropriate to a class action, was also sought.

The answers of the defendants denied the legal conclusions asserted by the plaintiff. They did not admit the allegations that related to the representative character of the action, but they did not dispute any allegations of fact that related to the basic issues.

All parties moved for summary judgment, and the trial court entered an order on March 30, 1971, granting the basic relief prayed for in the complaint, but reserving jurisdiction to determine the class aspect of the action. The order also found that Article IX-A is not applicable to personal property taxes, the assessment of which was commenced prior to January 1, 1971. The defendant, Robert J. Lehnhausen, Director of the Department of Local

Government Affairs of the State of Illinois, has appealed, and the plaintiff has cross appealed from that portion of the order that related to the particular taxes to which the court's order was applicable.

A petition seeking leave to file an original action in this court was filed on May 10, 1971 on behalf of Eugene L. Maynard, "a natural person, citizen and taxpayer of the State of Illinois," and also on behalf of one high school district and three grade school districts. Leave to file was granted on May 12, 1971. The defendants are those state and county officers who are defendants in the Lake Shore case. The complaint, which sought a declaratory judgment and other relief, alleges the adoption of Article IX-A. It is suggested that "the *Lake Shore* case will come to the Court in a flawed condition in that it will not properly present the parties and arguments essential for a full determination of the important revenue question. * * * Without the presence of Eugene L. Maynard, neither the presence nor the position of a natural person will be adequately presented to this Court." The complaint alleged that it was filed by Maynard, who is alleged to own non-business personal property, on behalf of himself and all others similarly situated. It also alleged that it was filed on behalf of the named public bodies for themselves and all other public bodies which receive proceeds from personal property taxation.

The deficiencies in parties and in legal arguments in the *Lake Shore* case is said to lie in the fact that the only plaintiff in that case is a corporation, and in the fact that the complaint in that case does not contain a direct request for a declaration of the unconstitutionality of Article IX-A. "The pleadings of that case place into question only certain sections of the Illinois Revenue Act. The

attack is made upon these sections as affected by the passage of Article IX-A rather than upon the constitutionality of the Article itself. * * * If the Court considers the *Lake Shore* case without additional parties and arguments, it may be foreclosed from ruling on the central issue of constitutionality of the Amendment."

No new facts were alleged in the Maynard case, and the defendant Lehnhausen has conceded the factual questions and filed a brief to stand as its answer in this case. The brief on behalf of the defendant county officers appears similarly to have been intended to stand as a motion to dismiss the complaint.

Another action was instituted by a complaint for declaratory judgment which was filed in the circuit court of Cook County on May 8, 1971, on behalf of several plaintiffs. Clemens K. Shapiro alleged that he is a natural person who owns personal property in his own name and real property jointly with his wife, none of which property is owned or used for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family. Jerome Herman alleged that he is a natural person and operates and conducts a business as a sole proprietor. Guy S. Ross and Eugene D. Ross allege that they are natural persons and operate, as a partnership, a business which owns property. M. Weil and Sons, Inc., a corporation, alleges that it is the owner of property situated in Cook County.

The complaint alleges that each of the plaintiffs is acting in a representative capacity on behalf of all others similarly situated. The defendants are those state and county officers who were named in the Lake Shore complaint. The complaint alleges the adoption of Article IX-A and asserts various interpretations of that Article, some of which are

advanced by all of the plaintiffs and others by one or another of the plaintiffs. To this complaint the defendant Lehnhausen, Director of the Department of Local Government Affairs, filed a motion to dismiss on May 9, 1971. He also filed a "Petition for Instructions" which recited that the Lake Shore and Maynard cases were pending in the Supreme Court of Illinois, asserted that the issues in all of the three cases were substantially the same, and that it "would appear to be a duplication of effort for this Court to consider the issues involved in the case at bar [the Shapiro case] while at the same time the Illinois Supreme Court has essentially the same issues before it for consideration." The petition for instructions suggested that the Shapiro case be held in abeyance for the determination of the cases already pending before the Supreme Court. No order was entered with respect to this petition. On May 19, 1971, a motion to strike was filed in behalf of the defendant county officers. On May 28, 1971, an order was entered, by a judge other than the judge who heard the Lake Shore case, finding that the action was properly maintained as a class action and that each plaintiff had standing to bring the action in its own behalf and was a proper representative of the class he purported to represent. The order found that Article IX-A "is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families." Except as to the plaintiff Clemens K. Shapiro and members of his class, the complaint was dismissed. All of the plaintiffs in the Shapiro case have appealed from this judgment.

The plaintiffs in the Maynard and Shapiro cases justify the institution of their actions upon the ground that there are deficiencies as to parties and as to legal propositions in the Lake Shore case which might, without the assistance which they volunteer to supply, preclude the possibility of full consideration of the issues by this court. That it is not necessary that each person or group of persons favorably or unfavorably affected by a legislative classification be made parties to an action challenging the validity of that classification is apparent. Major cases involving discrimination of the sort here alleged have not required the presence, as parties, either in person or by representative, of all those affected. See, *e.g.*, *Lawrence v. State Tax Com. of Miss.* (1932), 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102.

There are no factual issues in the present cases, and the order of this court which consolidated the Lake Shore and Maynard cases provided: "Counsel may brief and argue all issues as to the validity and effect of the constitutional amendment known as Article IX-A of the Constitution of 1870." (See *Hux v. Raben* (1967), 38 Ill. 2d 223.) Additional class actions were not necessary to place before the court all pertinent legal theories. We shall, however, consider the arguments advanced by counsel in those cases.

Neither the plaintiffs in the Maynard case nor those in the Shapiro case are content with the interpretation of Article IX-A arrived at by Judge Walter P. Dahl in the Lake Shore case. That interpretation was that the new Article "purports to prohibit the taxation of personal property by valuation as to 'individuals', and only as to 'individuals,' while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois . . . which imposed such personal property taxes as to

property owned by corporations and other 'non-individuals.' "

One alternative construction, advanced by the plaintiffs in the Shapiro case, is that the "Illinois' Constitution of 1870, as amended by the addition of Article IX-A, specifically prohibits, and declares to be unconstitutional the imposition in Illinois of the property taxes imposed by Article IX, Section 1, on all forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner." This construction is achieved by disregarding the fact that Article IX-A is clearly concerned only with the taxation of personal property, and by concentrating upon the fact that the last sentence in the official explanation which appeared upon the ballot at the election on November 3, 1970, when Article IX-A was approved, mentioned taxes upon both real and personal property. That explanation was as follows:

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

The last sentence of the explanation, however, is not a part of the amendment, and its reference to real property taxes was made in describing the existing provisions of Article IX, Section 1, which are modified by Article IX-A.

Based upon the circumstance that the phrase "as to individuals" is printed in italics in Article IX-A, the May-

nard plaintiffs turn to materials other than the legislative explanations in a search for a technical meaning. They say: "The unusual circumstance that the words 'as to individuals' are italicized in the constitutional amendment, an unprecedented practice in constitutional drafting, strongly suggests that the General Assembly, in drafting Senate Joint Resolution No. 30 used the word 'individuals' as one having established technical significance and usage in the classification of taxpayers upon whom personal property taxes have been imposed."

They purport to find the technical meaning that they seek in the circumstance that two different forms, administratively prescribed, have been used for personal property tax returns. One form is to be used by "individuals, partnerships, and unincorporated associations owning or controlling personal property used in agriculture, and all individuals owning or controlling any personal property which is not owned or used in connection with any business (other than agriculture) * * *." The other form is to be used by "[p]roprietorships, partnerships and unincorporated associates engaged in business (other than agriculture) * * *." On the assumption that the word "individuals" was intended to have an established technical meaning because it was printed in italics, the Maynard plaintiffs, and the Shapiro plaintiffs as well, argue that the word "individuals" was used to denote a class of natural persons owning personal property not used in business.

There is, however, a more prosaic explanation for the fact that the words "as to individuals" are printed in italics. When Senate Joint Resolution No. 30 was originally introduced on April 29, 1969, the proposed Article IX-A read as follows: "Notwithstanding any other provision of

this Constitution, the taxation of personal property by valuation is prohibited." (Senate Journal, April 29, 1969, p. 1038.) On May 15, 1969, Senate Joint Resolution No. 30 was amended "by striking the period and adding the following: 'as to individuals.'" Senate Journal, May 15, 1969, pp. 1407-8.

The added words were placed in *italics* in accordance with routine legislative practice, which contemplates that in the case of amendments, new material is to be *italicized*. The rules of the Senate of the 76th General Assembly provided: "All resolutions originated in the Senate proposing amendments to the Constitution shall be ordered printed and shall be printed in the same manner in which bills are printed." (Senate Journal, Feb. 18, 1969, p. 163.) And as to bills, they provided: "Senate Bills and House Bills in the Senate shall be printed with new matter in *italics* and omitted or superseded matter enclosed in brackets and underlined." Senate Journal, Feb. 18, 1969, p. 161.

There is thus no underpinning for the argument that the General Assembly intended that the word "*individuals*" should be given an artificial meaning. The official explanations, which are not discussed in the Maynard brief, definitely negative such an intention. We have examined the other materials to which the Maynard and Shapiro plaintiffs have referred, but have found nothing which persuades us that the words of Article IX-A should be given anything other than their natural meaning.

We conclude that the meaning of Article IX-A is that *ad valorem* taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited.

The Maynard case plaintiffs and all of the Shapiro case plaintiffs, with the exception of Shapiro, contend that Ar-

ticle IX-A, so construed, violates the equal protection clause of the fourteenth amendment to the constitution of the United States. Lake Shore contends that it is the Revenue Act, which must be regarded as amended by Article IX-A, rather than the Article itself, which violates the equal protection clause. We shall first consider the basic question of the validity of the discrimination effected by Article IX-A.

The new Article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed. Of course, the equal protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the states in drawing the lines between classes. Nevertheless, a state may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated.

The Supreme Court of the United States has thus described the governing principles:

"Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237;

Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293; * * * *State Board of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co. v. Conway*, supra, 281 U.S., at 159.

"But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of legislation.' *Royster Guano Co. v. Virginia*, 253 U.S. 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 37; *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160 * * *."

Allied Stores of Ohio, Inc. v. Bowers, (1959), 358 U.S. 522, 526-27, 79 S. Ct. 437, 3 L. Ed. 2d 480, 484-85.

When classifications are reasonable, it is because of differences in the nature of the property or in the use to which it is put. The nature of the tax is important, too, for what may be a reasonable classification for a license, or for a privilege tax, is not necessarily a reasonable classification for a property tax.

Mr. Justice Brandeis stated the criterion this way in his dissenting opinion in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406, 48 S. Ct. 553, 72 L. Ed. 927, 932: "In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civ-

ilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible."

Article IX-A must be read against the scheme of property taxation established pursuant to Article IX of the Constitution of 1870, which, with respect to property taxes contemplates the levy of "a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." (Constitution of 1870, Article IX, Sec. 1.) Taxes levied by municipal corporations are required to be "uniform in respect to persons and property, within the jurisdiction of the body imposing the same." (Constitution of 1870, Article IX, Sec. 9.) The permissible exemptions from taxation are thus described. "The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horitcultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. * * *" Constitution of 1870, Article IX, Sec. 3.

Against this background the incongruity of the prohibition contained in Article IX-A is apparent. It cannot rationally be said that the prohibition promotes any policy

other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others. For the purpose of a tax by valuation upon the ownership of real or personal property, the identity of the owner is a neutral consideration, as is his status as sole proprietor, joint tenant, tenant in common, partner (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 25), limited partnership (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 61), member of a professional service corporation (Ill. Rev. Stat. 1969, ch. 32, par. 415-1 *et seq.*), or of a professional association (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 101 *et seq.*; see Sup. Ct. Rule 721; 43 Ill. 2d, Rule 721).

We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the fourteenth amendment. Apart from that discrimination, the validity of the Revenue Act is not challenged, and we hold that it is Article IX-A which must fall. The validity of Article IX of the Constitution and of the Revenue Act are therefore not affected.

The judgment of the circuit court of Cook County in No. 44199 (Lake Shore) is reversed, and the cause is remanded to that court with directions to dismiss the complaint. Insofar as the judgment of the circuit court in No. 44432 (Shapiro) dismissed the complaint as to all of the plaintiffs other than Clemens K. Shapiro, it is affirmed; insofar as that judgment sustained the complaint as to Clemens K. Shapiro, it is reversed and the cause is remanded to that court with directions to dismiss the complaint. In No. 44308 (Maynard), the complaint is dismissed.

No. 44199. *Reversed and remanded with directions.*

No. 44432. *Affirmed in part; reversed in part, and remanded with directions.*

No. 44308. *Complaint dismissed.*

(Lake Shore Auto Parts Co. v. Korzen, Nos. 44199, 44308, 44432)

MR. JUSTICE DAVIS, dissenting:

The majority opinion holds that our State Constitution of 1870, as modified by Article IX-A, may not validly classify exemptions from ad valorem personal property taxation on the basis of the ownership of the property, and that such exemption may be made only upon a classification based upon the nature of the property or its use. I dissent from this pronouncement.

It is clear that the United States Constitution imposes no particular modes of taxation upon the states and leaves them unrestricted in their power to tax those domiciled within their borders so long as the tax imposed is upon property within the state, or on privileges enjoyed there, and so long as the tax is not so palpably arbitrary or unreasonable as to infringe upon the equal protection and due process requirements of the fourteenth amendment. *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 284, 52 S. Ct. 556, 559, 76 L. Ed. 1102, 1105.

The majority opinion recognizes that "the equal protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the states in drawing the line between classes"; and that, "nevertheless, a state may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated." This general rule is found in the quotation from *Allied Stores of Ohio v. Bow-*

ers, 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480, cited by the majority. The rule has been expressed and exemplified many times in varying terms. Examples are: "Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action." (*Welch v. Henry*, 305 U.S. 134, 144, 59 S. Ct. 121, 124, 83 L. Ed. 87, 92); "It is a salutary principle of judicial decision, * * * that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." (*Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584, 55 S. Ct. 538, 540, 79 L. Ed. 1071, 1073.) Due process imposes no rigid rule of equality in taxation, and irregularities resulting from singling out one particular class for taxation or exemption infringe no constitutional requirement. (*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S. Ct. 868, 872, 81 L. ed. 1245, 1253). It is only the invidious discrimination or classification which is patently arbitrary and utterly lacking in rational justification which is barred by the due process or equal protection clauses. *Flemming v. Nestor*, 363 U.S. 603, 611, 612, 80 S. Ct. 1367, — 4 L. ed. 2d 1435, 1445.

The variety of ways of expressing the rule that a legislative classification for taxation purposes is not violative of the fourteenth amendment if it has a reasonable relation to the subject of the particular legislation so that all

persons similarly situated are treated alike, and pertinent citations, are found in 16A C.J.S. Constitutional Law, Sections 520, 521, 649.

In this litigation, as is often the case, the particular expression of the rule which the majority of the court choose to rely upon may be dictated by the outcome which the judges of the majority think to be proper. Beyond doubt, the fourteenth amendment does not impose on the states an inflexible and technical rule of equal taxation, and the extent to which the states may go in devising a legislative classification for taxation is illustrated by the statement of the Supreme Court in *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 284, 285, 52 S. Ct. 556, 559, 76 L. ed. 1102, 1108:

"The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions."

The Supreme Court in *Lawrence* also stated that there is no constitutional requirement that a system of taxation should be uniform as applied to individuals and corporations, regardless of the circumstances in which it operates (286 U.S. 276, 283, 52 S. Ct. 556, 558, 76 L. ed. 1107), and we have just recently held that for the purpose of income taxation, corporations may be placed in one class and individuals in another and each taxed differently. (*Thorpe v. Mahin*, 43 Ill. 2d 36.) The language of the court at pages 45 and 46 is worthy of repetition.

"It is next contended that the Act violates the uniformity provision of Section 1 of Article IX of our constitution and the equal protection and due process

requirements of the fourteenth amendment to the United States constitution by creating multiple classes and discriminating unreasonably among them. This contention is advanced specifically against the provisions which tax corporations at a 4% rate and individuals, trusts, and estates at 2½% rate.

"Both the equal protection argument and the uniformity argument depend on the reasonableness of putting corporations in one class and individuals, trusts, and estates in another class for purposes of this tax. (See *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289). When the due process contention has been advanced, this court, citing Supreme Court cases, has stated: 'It has long been settled that the power of the legislature to make classifications, particularly in the field of taxation, is very broad, and that the fourteenth amendment imposes no "iron rule" of equal taxation. (Citations.) The reasons justifying the classification, moreover, need not appear on the face of the statute, and the classification must be upheld if any state of facts reasonably can be conceived that would sustain it. (Citations.) The burden therefore rests on one who assails the statute to negate the existence of such facts. (Citations.)' *Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 489-490.

"When the uniformity contention has been advanced this court has stated: 'It is well established that the legislature has broad powers to establish reasonable classifications in defining subjects of taxation. * * * Such classification must, however, be based on real and substantial differences between persons taxed and those not taxed. (Citations.)' (*Klein v. Hulman*, 34 Ill. 2d 343, 346-347.) 'In order to prevail on an allegation that a statute or portion of a statute is unconstitutional, the plaintiff has the burden of showing how the legislature has violated the constitution.' *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289, 291.

"In short, petitioners have the burden of showing that the challenged classification is unreasonable. Their

only assertion is that, 'corporations are at a disadvantage when they compete in the same type of business with individual proprietorships or partnerships because of the rate differential.' This assertion has been rejected by the Supreme Court as to a Federal tax (*Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed. 389), and as to a State tax (*Fort Smith Lumber Co. v. Arkansas ex rel. Arbuckle*, 251 U.S. 532, 40 S. Ct. 304, 64 L. Ed. 396), and by this court (*People v. Franklin National Insurance Co. of New York*, 343 Ill. 336; *Michigan Millers Mutual Fire Insurance Co. v. McDonough*, 358 Ill. 575), where, for purposes of the tax in question, corporations were placed in one class and individuals in another and each were taxed differently."

The majority, however, holds that as to a property tax the classification for exemption or taxation may not be based upon the character of the ownership, but only upon the nature of the property itself. Thus, the majority is of the opinion that the classification may not be based upon the corporation—individual distinctions which we upheld in *Thorpe*.

In *Thorpe* this court reversed its prior holding that income is property (*Bachrach v. Nelson*, 349 Ill. 579), and held that an income tax was not a property tax. The significance of this determination was that Section 1 of Article IX of our Constitution of 1870 required the levying of a tax "by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." At the same time, the constitutional provisions permitted a tax upon franchises and privileges in such manner as the legislature might direct, so long as it was uniform as to each "class." Obviously, the legislature could not, under the foregoing provisions, impose

an income tax upon corporations at one rate and upon individuals at a lesser rate if it were a tax on property. Our constitution then prohibited any tax on property unless structured to be uniform as to valuation.

After reaching the conclusion that an income tax was not a property tax, the court faced no barrier in upholding the Illinois Income Tax Act. In the case at bar, after Article IX-A amendment to the Constitution of 1870 was adopted, the uniformity provisions of Section 1 of Article IX were no longer effective as to the taxation of personal property of individuals, and the court should have found no impediment to upholding the validity of Article IX-A and the abolishment of this tax as to individuals.

Constitutional provisions requiring property to be taxed uniformly in proportion to its value are not uncommon to the states. In the California Railroad Tax cases (*San Mateo County v. Southern Pacific R. Co.*, 13 Fed. 722, appeal dismissed per stipulation, 116 U.S. 138; *Santa Clara County v. Southern Pacific R. Co.*, 18 Fed. 385, aff'd other grounds, 118 U.S. 394), which held that unequal taxation, based upon the character of the owner, was forbidden by the fourteenth amendment, a constitutional provision requiring uniformity of taxation was involved. Even though the California constitution specified that all property be taxed in proportion to its value, a state statute especially provided that as to railroad properties only, the amount of a mortgage on the real estate was not to be deducted in ascertaining the value of the real estate for taxation purposes. The trial court quite properly held that this method of valuation, as to railroads only, was improper under the circumstances, and the United States Supreme Court affirmed the lower court on a non-constitutional basis without reaching the constitutional question. The California

Railroad Tax cases should be read, with cognizance, that the state constitution required all property to be taxed in proportion to its value, and that the cases arose at a time when it was necessary to establish that the word, "persons" as used in the fourteenth amendment, included corporations. Apparently, the latter point had a strong bearing on the expressions found in these cases.

In the case at bar, by virtue of the adoption of Article IX-A, there is no constitutional requirement that taxes on personal property be uniform as to individuals and corporations so that each pays a tax in proportion to the value of his or its property. Article IX-A, which we are called upon to consider, eliminated this requirement; it provides that "the taxation of personal property is prohibited as to individuals." Thus, the case at bar is a far cry from one in which the legislature is attempting to discriminate between individuals and corporations in the face of a constitutional provision prohibiting such discrimination. Here the question for determination is whether, absent the requirement of a state constitution that corporate and individual personal properties be taxed the same, the equal protection clause of the fourteenth amendment permits them to be taxed differently? I believe that it does!

Without the constitutional requirement of uniformity on the taxation of properties, there is no reason or justification in the case at bar for stating that personal property taxation may not be classified on the basis of the ownership of the property. The Constitution of 1870, as amended by Article IX-A, does not so provide, and the Constitution of 1970 suggests the contrary. Article IX of the Constitution of 1970 relates to revenue, and Section 5 thereof pertains to personal property taxation. Subsection (a) thereof provides that the legislature "may clas-

sify personal property for purpose of taxation by valuation, abolish such taxes on any or all *classes* and authorize the levy of taxes in lieu of the taxation of personal property by valuation." (Emphasis ours.) Without more, it could be said that the word "classes" refers only to classes of property, but subsection (c) refers to the abolition of all ad valorem personal property taxes by January 1, 1979, and the replacement of the lost revenue, and provides: "Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those *classes* relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971." (Emphasis ours.) Obviously, the word "classes" as there used, does not refer to classes of property; it refers to classes of property owners, and provides for taxation according to the character of the owner. If the majority opinion is to stand and Article IX-A held to be unconstitutional, then under consistent application of its rationale, subsection (a) of Section 5 of the new constitution is likewise unconstitutional.

The majority opinion chose to rely upon the rationale of *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. ed. 927. I believe that the elucidation and logic of the dissent of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, offers the better reason. Therein, Mr. Justice Brandeis made some observations which are particularly apropos here. The court had under consideration a tax on the gross receipts of corporate taxicab companies where no similar tax was imposed upon the receipts of individuals who operated taxicabs. The majority held that the classification was based solely upon the character of the owner, and that it violated the fourteenth amendment.

In his dissenting opinion, 277 U.S. 389, 403-412, 48 S. Ct. 553, 555-558, 72 L. ed. 927,—, Mr. Justice Brandeis observed that the tax applied equally to all corporations, foreign and domestic. He stated that the fundamental question before the court was:

“Does the equality clause prevent a state from imposing a heavier burden of taxation upon corporations engaged exclusively in intrastate commerce, than upon individuals engaged under like circumstances in the same kind of business? The narrowed question presented is whether this heavier burden may be imposed by a form of tax ‘not peculiarly applicable to corporations’; that is, by a tax of such a character that it might have been extended to individuals if the Legislature had seen fit to do so.”

He then pointed out that the difference between a business carried on in corporate form and one carried on by natural persons is “a real and important one.” He observed that the discrimination was not based upon any difference in the source of income or in the character of the property employed, and stated the obvious: that the requirement that a classification must be reasonable does not imply that the policy embodied in the classification must be deemed by the court to be a wise one. He concluded that a state is permitted to impose upon corporations more than their pro rata share of the burden of taxation, and that nothing in the Federal constitution prohibits this.

It seems that this is exactly what we held in *Thorpe v. Mahin*, 43 Ill. 2d 36. We recognized what we called the obvious advantages of carrying on a business in the corporate form. The privilege of carrying on a business in this form has many advantages: the corporate ownership of property, freedom from personal liability for corporate obligations, continuity of existence, etc. There we acknowl-

edged that there are sufficient differences between the privilege of earning or receiving income as a corporate entity and that of earning or receiving income as an individual, to justify the variance in tax rates between the individual and the corporation, and here we should recognize that there are sufficient differences between the privilege of owning property as a corporate entity and the privilege of owning it as an individual to justify the exemption in the case of the individual property owner. The fact that the corporation may in some respects be placed at a disadvantage in its competition with individuals owning similar property and engaged in the same business should not condemn the classification as unreasonable. *Thorpe v. Mahin*, supra, 46.

There is no more compelling reason to suggest that the classifications for personal property tax purposes must be based upon the nature of the property than there is to suggest that the classifications for income tax purposes must be based on the source or type of income to be reported. The Article IX-A constitutional amendment creates a classification based upon the distinctions inherent between corporations and individuals—a distinction which we have recognized and upheld as valid under the equal protection clause requirement of the fourteenth amendment in *Thorpe v. Mahin*.

Another matter is worthy of mention in our consideration of this case. The evils and the inequities in the administration of the personal property tax collections in this State are known to everyone. That these inequities apply with equal force to corporate taxpayers and individual taxpayers may, or may not, be totally true. The desire and purpose of systematically eliminating this archaic form of taxation are apparent from the actions of the

people and the legislature of the State. The General Assembly, which drafted and adopted Senate Joint Resolution No. 30, had previously at the same legislative session already exempted from such taxation, household furniture and one automobile, per household, used for personal pleasure. (Ill. Rev. Stat. 1969, ch. 120, par. 500.21a.) The Article IX-A amendment was overwhelmingly ratified by the people of the State. The Constitution of 1970, likewise adopted by the vote of the people, expressed their concern over the form and use of personal property taxation. The newly-adopted constitution prohibits the reinstatement of any ad valorem personal property tax abolished before July 1, 1971, the effective date of the new constitution. This provision refers to the personal property tax as to individuals which was abolished by Article IX-A, and the majority opinion runs counter to this constitutional prohibition in that it reinstates the personal property tax as to individuals. In addition, the new constitution provides that all ad valorem personal property taxes shall be abolished on or before January 1, 1979.

The obvious spirit of the Article IX-A amendment, the will of the people, as expressed by its adoption, and the intent and purpose of the legislature, should not be thwarted unless a construction to this effect is required. Thus, it is very appropriate that we consider the mischief sought to be remedied and the purpose to be accomplished by the Article IX-A amendment. (*Wolfson v. Avery*, 6 Ill. 2d 78, 88). Likewise, the court should memorialize the salutary rule of law that an amendment to a state constitution should be deemed violative of the Federal Constitution only where the asserted constitutional rights cannot otherwise be protected and effectuated. *Reynolds v. Sims*, 377 U.S. 533, 584, 84 S. Ct. 1362, —, 12 L. ed. 2d 506, 540.

After considering the background of this constitutional amendment and the purpose which it, along with the other contemporary legislative enactments and constitutional adoptions seeks to accomplish, I believe that the classification found in the Article IX-A amendment does not constitute an invidious discrimination; that it seeks to accomplish and promote a valid policy expressive of the will of the people and the intent and purpose of the legislature; and that the distinction upon which the classification for exemption is based does not overstep the limitations imposed by the fourteenth amendment.

ground of this constitutional which it, along with the other enactments and constitutional sh, I believe that the classification, I believe that the classification does not con- nation; that it seeks to accom- policy expressive of the will of nd purpose of the legislature; on which the classification for t overstep the limitations im- nendment.

Supreme Court of the United States

No. 71-685 ~~October Term 1971~~

Robert J. Leinhausen,

petitioner,

v.

Lake Shore Auto Parts Co., et al.

Order allowing certiorari. Filed April 3, 1972

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted. The case is consolidated with No. 71-691 and a total of one hour is allotted for oral argument.

Supreme Court of the United States

No. 71-691 ~~Order of Court~~

**Edward J. Barrett, County Clerk of Cook
County, Illinois, et al.,**

petitioners,

v.

Clemens K. Shapiro, et al.

Order allowing certiorari. Filed April 3, 19 72

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted. **The case is consolidated with No. 71-683 and a total of one hour is allotted for oral argument.**

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IN THE
Supreme Court of the United States

NOVEMBER TERM, A.D. 1971

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

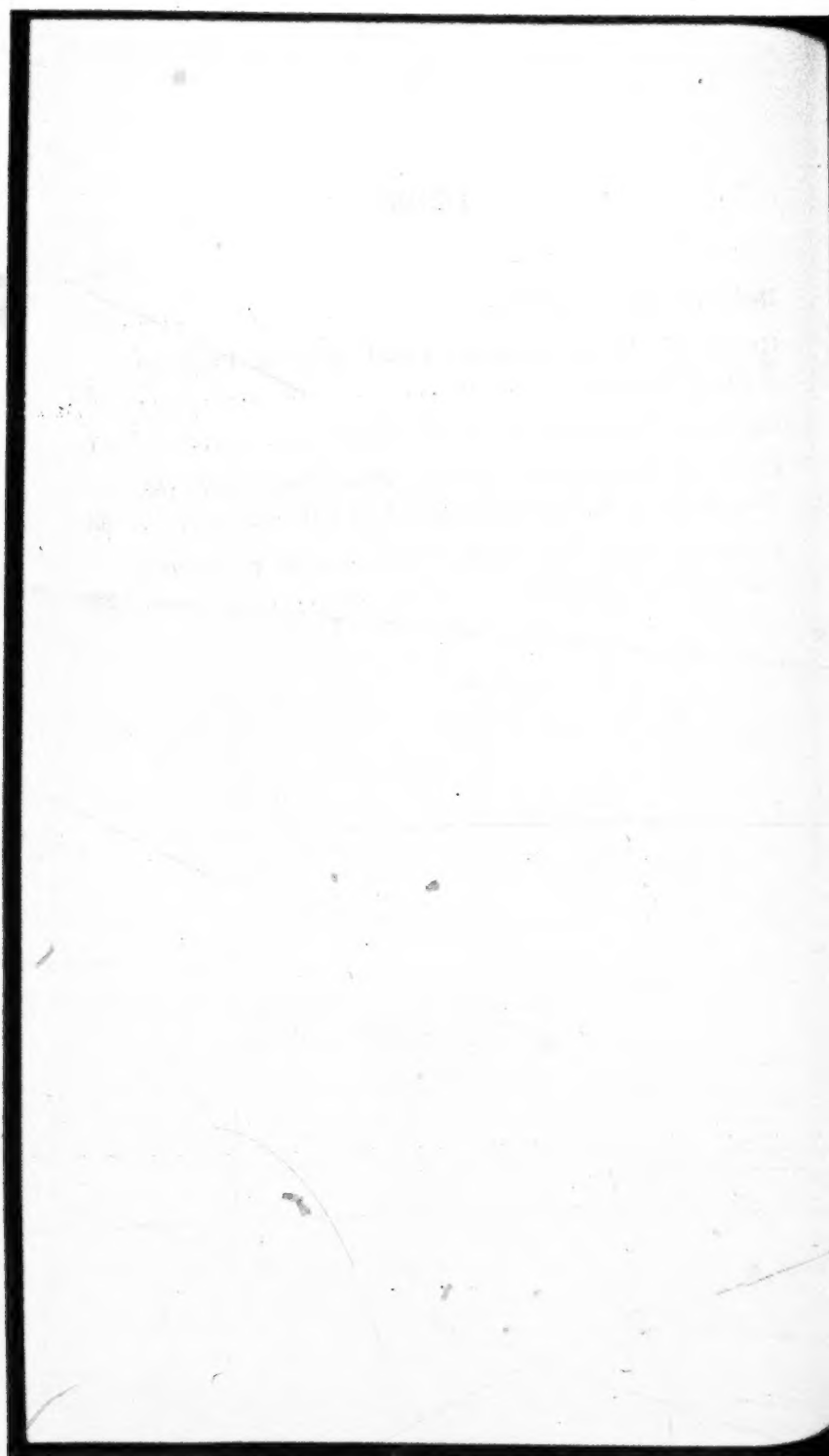
APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

VS.

CLEMENS K. SHAPIRO, et al.,

Respondents.

APPENDIX

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**ORDER OF THE SUPREME COURT OF
ILLINOIS
DENYING PETITIONS FOR REHEARING
UNITED STATES OF AMERICA**

State of Illinois)
Supreme Court) ss.
)

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of May in the year of our Lord, one thousand nine hundred and seventy-one, within and for the State of Illinois.

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER

JUSTICE DANIEL P. WARD

JUSTICE JOSEPH H. GOLDENHERSH

JUSTICE THOMAS E. KLUCZYNSKI

JUSTICE CHARLES H. DAVIS

JUSTICE HOWARD C. RYAN

WILLIAM J. SCOTT, ATTORNEY GENERAL

ROBERT G. MILEY, MARSHAL

ATTEST: JUSTICE TAFT, CLERK

Be It Remembered, that, to-wit: on the 24th day of August, A.D. 1971, the same being one of the days in vacation after the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Lake Shore Parts Co., et al., etc.,

Appellees

Nos. 44199, 44308, 44432, Cons.

v.

Bernard J. Korzen, etc., et al.,

Appellants

Appeal from Circuit Court Cook County

And now, on this day, the Court having duly considered the petitions for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petitions and denies the petitions for rehearing.

APPENDIX

Nos. 44199, 44308, 44432
Supreme Court of Illinois
July 9, 1971
Rehearing Denied Aug. 24, 1971

LAKE SHORE AUTO PARTS CO., et al.,

Appellees,

v.

**BERNARD J. KORZEN, County Treasurer and ex officio
 County Collector of Cook County, et al.,**

Appellants.

EUGENE L. MAYNARD et al.,

Petitioners,

v.

**EDWARD J. BARRETT, County Clerk of Cook County,
 et al.,**

Defendants.

CLEMENS K. SHAPIRO et al.,

Appellants.

v.

**EDWARD J. BARRETT, County Clerk of Cook County,
 et al.,**

Appellees.

SCHAEFER, Justice.

These consolidated cases present issues concerning the construction and the validity of article IX-A which was added to the constitution of 1870 by referendum vote at the November 1970 election. On June 30, 1969, the Senate and the House of Representatives concurred in the adoption of Senate Joint Resolution No. 30, which provided for the submission of the proposed amendment to a referendum vote. Senate Joint Resolution No. 30 (Senate Journal, June 30, 1969, p. 3476) is as follows:

"SENATE JOINT RESOLUTION NO. 30

Resolved, By the Senate of the Seventy-sixth General Assembly of the State of Illinois, the House of Representatives concurring herein, that there shall be submitted to the electors of the State for adoption or rejection at the next election of members of the general Assembly of the State of Illinois, in the manner provided by law, a proposition to add Article IX-A to the Constitution, the added Article to read as follows:

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971."

The explanation of the amendment which appeared upon the referendum ballot is as follows:

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions in Article IX, section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

Subsequently, on May 19, 1970, the Senate adopted Senate Joint Resolution No. 67 (Senate Journal May 19, 1970, p. 6) which contained a further statement of the intention of the General Assembly in adopting Senate Joint Resolution No. 30. Senate Joint Resolution No. 67 was concurred in by the House of Representatives on May 29, 1970 (Senate Journal May 29, 1970, p. 149). It reads as follows:

"SENATE JOINT RESOLUTION NO. 67

Resolved, By the Senate of the Seventy-sixth General Assembly of the State of Illinois, the House of Representatives concurring herein, that, in adopting Senate Joint Resolution No. 30, which submits to the electors of this State a constitutional amendment prohibiting the taxation of personal property by valuation as to individuals, it was the intention of this General Assembly to abolish the ad valorem taxation of personal property owned by a natural person or by two or more natural persons, and that, by the use of the phrase 'as to individuals', this General Assembly intended to mean a natural person, or two or more natural persons as joint tenants or tenants in common."

The first of the three consolidated actions that are before us was filed by Lake Shore Auto Parts Co., a corpo-

ration, on December 9, 1970. The complaint named as defendants the county clerk of Cook County, the county assessor, the county collector and the members of the board of appeals of that county, as well as the director of the Department of Local Government Affairs of the State. It alleged that it was filed as a class action on behalf of the plaintiff (hereafter Lake Shore) and on behalf of all other corporations and other "non-individuals" subject to personal property tax. It asserted that the new article IX-A violates the fourteenth amendment to the constitution of the United States because its effect "is to exonerate from ad valorem personal property taxation, on and after January 1, 1971, all personal property owned by 'individuals', while authorizing and requiring the continued ad valorem taxation of all personal property owned by entities other than 'individuals.'" It also alleged that the provisions of article IX-A immediately became a part of and amended the Revenue Act of 1939, so that that statute "imposes ad valorem taxes only with respect to personal property owned by corporations and other entities which are not 'individuals' within the meaning of said Article IX-A." The complaint prayed for a decree "finding and declaring that the provisions of the Revenue Act of 1939 * * *, as amended by Article IX-A of the Constitution of Illinois, are unconstitutional, invalid and unenforceable insofar and to the extent that such statute purports to impose ad valorem taxes with respect to personal property owned by plaintiff and all corporations and other 'non-individuals' who are members of the class which plaintiff represents." An injunction, as well as relief appropriate to a class action, was also sought.

The answers of the defendants denied the legal conclusions asserted by the plaintiff. They did not admit the allegations that related to the representative character

of the action, but they did not dispute any allegations of fact that related to the basic issues.

All parties moved for summary judgment, and the trial court entered an order on March 30, 1971, granting the basic relief prayed for in the complaint, but reserving jurisdiction to determine the class aspect of the action. The order also found that article IX-A is not applicable to personal property taxes the assessment of which was commenced prior to January 1, 1971. The defendant, Robert J. Lehnhausen, Director of the Department of Local Government Affairs of the State of Illinois, has appealed, and the plaintiff has cross-appealed from that portion of the order that related to the particular taxes to which the court's order was applicable.

A petition seeking leave to file an original action in this court was filed on May 10, 1971, on behalf of Eugene L. Maynard, "a natural person, citizen and taxpayer of the State of Illinois," and also on behalf of one high school district and three grade school districts. Leave to file was granted on May 12, 1971. The defendants are those State and county officers who are defendants in the Lake Shore case. The complaint, which sought a declaratory judgment and other relief, alleges the adoption of article IX-A. It is suggested that "the *Lake Shore* case will come to the Court in a flawed condition in that it will not properly present the parties and arguments essential for a full determination of the important revenue question. . . . Without the presence of Eugene L. Maynard, neither the presence nor the position of a natural person will be adequately presented to this Court." The complaint alleged that it was filed by Maynard, who is alleged to own non-business personal property, on behalf of himself and all others similarly situated. It also al-

leged that it was filed on behalf of the named public bodies for themselves and all other public bodies which receive proceeds from personal property taxation.

The deficiencies in parties and in legal arguments in the Lake Shore case is said to lie in the fact that the only plaintiff in that case is a corporation, and in the fact that the complaint in that case does not contain a direct request for a declaration of the unconstitutionality of article IX-A. "The pleadings of that case place into question only certain sections of the Illinois Revenue Act. The attack is made upon these sections as affected by the passage of Article IX-A rather than upon the constitutionality of the Article itself. * * * If the Court considers the *Lake Shore* case without additional parties and arguments, it may be foreclosed from ruling on the central issue of constitutionality of the Amendment."

No new facts were alleged in the Maynard case, and the defendant Lehnhausen has conceded the factual questions and filed a brief to stand as his answer in this case. The brief on behalf of the defendant county officers appears similarly to have been intended to stand as a motion to dismiss the complaint.

Another action was instituted by a complaint for declaratory judgment which was filed in the circuit court of Cook County on May 8, 1971, on behalf of several plaintiffs. Clemens K. Shapiro alleged that he is a natural person who owns personal property in his own name and real property jointly with his wife, none of which property is owned or used for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family. Jerome Herman alleged that he is a natural person and operates and conducts a business as a sole proprietor. Guy S. Ross and Eugene D.

Ross allege that they are natural persons and operate, as a partnership, a business which owns property. M. Weil and Sons, Inc., a corporation, alleges that it is the owner of property situated in Cook County.

The complaint alleges that each of the plaintiffs is acting in a representative capacity on behalf of all others similarly situated. The defendants are those State and county officers who were named in the Lake Shore complaint. The complaint alleges the adoption of article IX-A and asserts various interpretations of that article, some of which are advanced by all of the plaintiffs and others by one or another of the plaintiffs. To this complaint the defendant Lehnhausen, Director of the Department of Local Government Affairs, filed a motion to dismiss on May 9, 1971. He also filed a "Petition for Instructions" which recited that the Lake Shore and Maynard cases were pending in the Supreme Court of Illinois, asserted that the issues in all of the three cases were substantially the same, and that it "would appear to be a duplication of effort for this Court to consider the issues involved in the case at bar [the Shapiro case] while at the same time the Illinois Supreme Court has essentially the same issues before it for consideration." The petition for instructions suggested that the Shapiro case be held in abeyance for the determination of the cases already pending before the Supreme Court. No order was entered with respect to this petition. On May 19, 1971, a motion to strike was filed in behalf of the defendant county officers. On May 28, 1971, an order was entered, by a judge other than the judge who heard the Lake Shore case, finding that the action was properly maintained as a class action and that each plaintiff had standing to bring the action in its own behalf and was a proper representative of the class

he purported to represent. The order found that article IX-A "is free of the ambiguity and uncertainty of intentment charged by the plaintiffs, and that its intentment is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families." Except as to the plaintiff Clemens K. Shapiro and members of his class, the complaint was dismissed. All of the plaintiffs in the Shapiro case have appealed from this judgment.

[1] The plaintiffs in the Maynard and Shapiro cases justify the institution of their actions upon the ground that there are deficiencies as to parties and as to legal propositions in the Lake Shore case which might, without the assistance which they volunteer to supply, preclude the possibility of full consideration of the issues by this court. That it is not necessary that each person or group of persons favorably or unfavorably affected by a legislative classification be made parties to an action challenging the validity of that classification is apparent. Major cases involving discrimination of the sort here alleged have not required the presence, as parties, either in person or by representative, of all those affected. See *e.g.*, *Lawrence v. State Tax Comm. of State of Mississippi* (1932), 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102.

There are no factual issues in the present cases, and the order of this court which consolidated the Lake Shore and Maynard cases provided: "Counsel may brief and argue all issues as to the validity and effect of the constitutional amendment known as Article IX-A of the Constitution of 1870." (See *Hux v. Raben* (1967), 38 Ill. 2d 223, 230 N.E. 2d 831.) Additional class actions were not necessary to place before the court all pertinent

legal theories. We shall, however, consider the arguments advanced by counsel in those cases.

Neither the plaintiffs in the Maynard case nor those in the Shapiro case are content with the interpretation of article IX-A arrived at by Judge Walter P. Dahl in the Lake Shore case. That interpretation was that the new Article "purports to prohibit the taxation of personal property by valuation as to 'individuals', and only as to 'individuals', while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois * * * which imposed such personal property taxes as to property owned by corporations and other 'non-individuals.'"

One alternative construction, advanced by the plaintiffs in the Shapiro case, is that the "Illinois' Constitution of 1870, as amended by the addition of Article IX-A, specifically prohibits, and declares to be unconstitutional the imposition in Illinois of the property taxes imposed by Article IX, Section 1, on all forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner." This construction is achieved by disregarding the fact that article IX-A is clearly concerned only with the taxation of personal property, and by concentrating upon the fact that the last sentence in the official explanation which appeared upon the ballot at the election of November 3, 1970, when article IX-A was approved, mentioned taxes upon both real and personal property. That explanation was as follows:

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not effect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this re-

sult by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

The last sentence of the explanation, however, is not a part of the amendment, and its reference to real property taxes was made in describing the existing provisions of article IX, section 1, which are modified by article IX-A.

Based upon the circumstance that the phrase "as to individuals" is printed in italics in article IX-A, the Maynard plaintiffs turn to materials other than the legislative explanations in a search for a technical meaning. They say: "The unusual circumstance that the words 'as to individuals' are italicized in the constitutional amendment, an unprecedented practice in constitutional drafting, strongly suggests that the General Assembly, in drafting Senate Joint Resolution No. 30 used the word 'individuals' as one having established technical significance and usage in the classification of taxpayers upon whom personal property taxes have been imposed."

They purport to find the technical meaning that they seek in the circumstance that two different forms, administratively prescribed, have been used for personal property tax returns. One form is to be used by "individuals, partnerships, and unincorporated associations owning or controlling personal property used in agriculture, and all individuals owning or controlling any personal property which is not owned or used in connection with any business (other than agriculture) * * *." The other form is to be used by "[p]roprietorships, partnerships and unincorporated associates engaged in business (other

than agriculture) ***." On the assumption that the word "*individuals*" was intended to have an established technical meaning because it was printed in italics, the Maynard plaintiffs, and the Shapiro plaintiffs as well, argue that the word "*individuals*" was used to denote a class of natural persons owning personal property not used in business.

There is, however, a more prosaic explanation for the fact that the words "*as to individuals*" are printed in italics. When Senate Joint Resolution No. 30 was originally introduced on April 29, 1969, the proposed article IX-A read as follows: "Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited." (Senate Journal, April 29, 1969, p. 1038.) On May 15, 1969, Senate Joint Resolution No. 30 was amended "by striking the period and adding the following: '*as to individuals.*'" Senate Journal, May 15, 1969, pp. 1407-8.

The added words were placed in italics in accordance with routine legislative practice, which contemplates that in the case of amendments, new material is to be italicized. The rules of the Senate of the 76th General Assembly provided: "All resolutions originated in the Senate proposing amendments to the Constitution shall be ordered printed and shall be printed in the same manner in which bills are printed." (Senate Journal, Feb. 18, 1969, p. 163.) And as to bills, they provided: "Senate Bills and House Bills in the Senate shall be printed with new matter in italics and omitted or superseded matter enclosed in brackets and underlined." Senate Journal, Feb. 18, 1969, p. 161.

There is thus no underpinning for the argument that the General Assembly intended that the word "*individuals*" should be given an artificial meaning. The official

explanations, which are not discussed in the Maynard brief, definitely negative such an intention. We have examined the other materials to which the Maynard and Shapiro plaintiffs have referred, but have found nothing which persuades us that the words of article IX-A should be given anything other than their natural meaning.

We conclude that the meaning of article IX-A is that *ad valorem* taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited.

The Maynard case plaintiffs and all of the Shapiro case plaintiffs, with the exception of Shapiro, contend that article IX-A, so construed, violates the equal protection clause of the fourteenth amendment to the constitution of the United States. Lake Shore contends that it is the Revenue Act, which must be regarded as amended by article IX-A, rather than the article itself, which violates the equal-protection clause. We shall first consider the basic question of the validity of the discrimination effected by article IX-A.

The new article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed. Of course the equal-protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the States in drawing the lines between classes. Nevertheless, a State may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated.

The Supreme Court of the United States has thus described the governing principles:

"Of course, the State, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equity, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. *Bell's Gap R. Co. v. Commonwealth of Pennsylvania*, 134 U.S. 232, 237, 10 S. Ct. 533, 535, 33 L. Ed. 892; *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 293, 18 S. Ct. 594, 598, 42 L. Ed. 1037; * * * *State Board of Tax Com'rs of Indiana v. Jackson*, 283 U.S. 527, 537, 51 S. Ct. 540, 543, 75 L. Ed. 1248. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co. v. Conway*, *supra*, 281 U.S., [146], at 159, 50 S. Ct. [310], at page 314 [74 L. Ed. 775].

"But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' *F. S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 561, 64 L. Ed. 989; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37, 48 S. Ct.

423, 425, 72 L. Ed. 770; *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 85, 45 S. Ct. 12, 15, 69 L. Ed. 169; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240, 46 S. Ct. 260, 261, 70 L. Ed. 557; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160, 50 S. Ct. 310, 314, 74 L. Ed. 775 * * *."

Allied Stores of Ohio, Inc. v. Bowers (1959), 358 U.S. 522, 526-527, 79 S. Ct. 437, 440, 3 L. Ed. 2d 480, 484-485.

When classifications are reasonable, it is because of differences in the nature of the property or in the use to which it is put. The nature of the tax is important, too, for what may be a reasonable classification for a license, or a privilege tax, is not necessarily a reasonable classification for a property tax.

Mr. Justice Brandeis stated the criterion this way in his dissenting opinion in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406, 48 S. Ct. 553, 556, 72 L. Ed. 927, 932: "In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike, that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state, and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible."

Article IX-A must be read against the scheme of property taxation established pursuant to article IX of the

constitution of 1870, which, with respect to property taxes, contemplates the levy of "a tax, by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." (Const. of 1870, art. IX, Sec. 1.) Taxes levied by municipal corporations are required to be "uniform in respect to persons and property, within the jurisdiction of the body imposing the same." (Const. of 1870, art. IX, sec. 9.) The permissible exemptions from taxation are thus described: "The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law * * *." Const. of 1870 art. IX, sec. 3.

Against this background the incongruity of the prohibition contained in article IX-A is apparent. It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others. For the purpose of a tax by valuation upon the ownership of real or personal property, the identity of the owner is a neutral consideration, as is his status as sole proprietor, joint tenant, tenant in common, partner (Ill. Rev. Stat. 1969, ch. 106½, par. 25), limited partnership (Ill. Rev. Stat. 1969 ch. 106½, par. 61), member of a professional service corporation (Ill. Rev. Stat. 1969, ch. 32, par. 415-1 et seq.), or of a professional association (Ill. Rev. Stat.

1969, ch. 106 $\frac{1}{2}$, par. 101 et seq.; see Sup. Ct. Rule 721, Ill. Rev. Stat. 1969, ch. 110A, § 721; 43 Ill. 2d R. 721).

[2] We hold therefore, that the discrimination produced by article IX-A violates the equal-protection clause of the fourteenth amendment. Apart from that discrimination, the validity of the Revenue Act is not challenged, and we hold that it is article IX-A which must fall. The validity of article IX of the constitution and of the Revenue Act are therefore not affected.

The judgment of the circuit court of Cook County in No. 44199 (Lake Shore) is reversed, and the cause is remanded to that court with directions to dismiss the complaint. Insofar as the judgment of the circuit court in No. 44432 (Shapiro) dismissed the complaint as to all of the plaintiffs other than Clemens K. Shapiro, it is affirmed; insofar as that judgment sustained the complaint as to Clemens K. Shapiro, it is reversed and the cause is remanded to that court with directions to dismiss the complaint. In No. 44308 (Maynard), the complaint is dismissed.

No. 44199. Reversed and remanded with directions.

No. 44308. Complaint dismissed.

No. 44432. Affirmed in part; reversed in part and remanded, with directions.

DAVIS, Justice (dissenting).

The majority opinion holds that our State constitution of 1870, as modified by article IX-A, may not validly classify exemptions from ad valorem personal property taxation on the basis of the ownership of the property, and that such exemption may be made only upon a classification based upon the nature of the property or its use. I dissent from this pronouncement.

It is clear that the United States Constitution imposes no particular modes of taxation upon the states and leaves them unrestricted in their power to tax those domiciled within their borders so long as the tax imposed is upon property within the State, or on privileges enjoyed there, and so long as the tax is not so palpably arbitrary or unreasonable as to infringe upon the equal protection and due process requirements of the fourteenth amendment. *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 280, 52 S. Ct. 556, 557, 76 L. Ed. 1102, 1105.

The majority opinion recognizes that "the equal-protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the states in drawing the lines between classes"; and that, "nevertheless, a state may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated." This general rule is found in the quotation from *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480, cited by the majority. The rule has been expressed and exemplified many times in varying terms. Examples are: "Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action." (*Welch v. Henry*, 305 U.S. 134, 144, 59 S. Ct. 121, 124, 83 L. Ed. 87, 92); "It is a salutary principle of judicial decision, *** that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and ex-

perience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." (*Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584, 55 S. Ct. 538, 540, 79 L. Ed. 1070, 1073); due process imposes no rigid rule of equality in taxation, and irregularities resulting from singling out one particular class for taxation or exemption infringe no constitutional requirement. (*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S. Ct. 868, 872, 81 L. Ed. 1245, 1253); and it is only the invidious discrimination or classification which is patently arbitrary and utterly lacking in rational justification which is barred by the due process or equal protection clauses. *Flemming v. Nestor*, 363 U.S. 603, 611, 612, 80 S. Ct. 1367, 1373, 4 L. Ed. 2d 1435, 1445.

The variety of ways of expressing the rule that a legislative classification for taxation purposes is not violative of the fourteenth amendment if it has a reasonable relation to the subject of the particular legislation so that all persons similarly situated are treated alike, and pertinent citations, are found in 16A C.J.S. Constitutional Law, §§ 520, 521, 649.

In this litigation as is often the case, the particular expression of the rule which the majority of the court chooses to rely upon may be dictated by the outcome which the judges of the majority think to be proper. Beyond doubt, the fourteenth amendment does not impose on the states an inflexible and technical rule of equal taxation, and the extent to which the States may go in devising a legislative classification for taxation is illustrated by the statement of the Supreme Court in *Lawrence v. State Tax Commission of Mississippi*, 26 U.S. 276, 284, 285, 52 S. Ct. 556, 559, 76 L. Ed. 1102, 1108:

"The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions."

The Supreme Court in *Lawrence* also stated that there is no constitutional requirement that a system of taxation should be uniform as applied to individuals and corporations, regardless of the circumstances in which it operates (286 U.S. 276, 283, 52 S. Ct. 556, 558, 76 L. Ed. 1102, 1107), and we have just recently held that for the purpose of income taxation corporations may be placed in one class and individuals in another and each taxed differently. (*Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E. 2d 633.) The language of the court at pages 45 and 46, at page 638 of 250 N.E. 2d is worthy of repetition:

"It is next contended that the Act violates the uniformity provision of section 1 of article IX of our constitution and the equal-protection and due-process requirements of the fourteenth amendment to the United States constitution by creating multiple classes and discriminating unreasonably among them. This contention is advanced specifically against the provisions which tax corporations at a 4% rate and individuals, trusts, and estates at 2½% rate.

"Both the equal protection argument and the uniformity argument depend on the reasonableness of putting corporations in one class and individuals, trusts, and estates in another class for purposes of this tax. (See *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289, 247 N.E. 2d 606.) When the due-process contention has been advanced, this court, citing Supreme Court cases, has stated: 'It has long been settled that the power of the legislature to make classifications,

particularly in the field of taxation, is very broad, and that the fourteenth amendment imposes no "iron rule" of equal taxation. [Citations.] The reasons justifying the classification, moreover, need not appear on the face of the statute, and the classification must be upheld if any state of facts reasonably can be conceived that would sustain it. [Citations.] The burden therefore rests on one who assails the statute to negate the existence of such facts. [Citations.] *Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 489-490, 119 N.E. 2d 215.

When the uniformity contention has been advanced this court has stated: 'It is well established that the legislature has broad powers to establish reasonable classifications in defining subjects of taxation. " * * Such classification must, however, be based on real and substantial differences between persons taxed and those not taxed. [Citations.]' (*Klein v. Hulman*, 34 Ill. 2d 343, 346-347, 215 N.E. 2d 268, 270.) 'In order to prevail on an allegation that a statute or portion of a statute is unconstitutional, the plaintiff has the burden of showing how the legislature has violated the constitution.' *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289, 291, 247 N.E. 2d 606, 608.

"In short, petitioners have the burden of showing that the challenged classification is unreasonable. Their only assertion is that 'corporations are at a disadvantage when they compete in the same type of business with individual proprietorships or partnerships because of the rate differential.' This assertion has been rejected by the Supreme Court as to a Federal tax (*Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed. 389), and as to a State tax (*Fort Smith Lumber Co. v. Arkansas ex rel. Arbuckle*, 251 U.S. 352, 40 S. Ct. 304, 64 L. Ed. 396), and by this court (*People v. Franklin National Insurance Co. of New York*, 343 Ill. 336, 175 N.E. 431; *Michigan Millers' Mutual Fire Insurance Co. v. McDonough*, 358 Ill. 575, 193 N.E. 662), where, for pur-

poses of the tax in question, corporations were placed in one class and individuals in another and each were taxed differently."

The majority, however, holds that as to a property tax the classification for exemption or taxation may not be based upon the character of the ownership, but only upon the nature of the property itself. Thus, the majority is of the opinion that the classification may not be based upon the corporation—individual distinctions which we upheld in *Thorpe*.

In *Thorpe* this court reversed its prior holding that income is property (*Bachrach v. Nelson*, 349 Ill. 579, 182 N.E. 909), and held that an income tax was not a property tax. The significance of this determination was that section 1 of article IX of our Constitution of 1870) required the levying of a tax "by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." At the same time, the constitutional provisions permitted a tax upon franchises and privileges in such manner as the legislature might direct, so long as it was uniform as to each "class." Obviously, the legislature could not, under the foregoing provisions, impose an income tax upon corporations at one rate and upon individuals at a lesser rate if it were a tax on property. Our constitution then prohibited any tax on property unless structured to be uniform as to valuation.

After reaching the conclusion that an income tax was not a property tax, the court faced no barrier in upholding the Illinois Income Tax Act. In the case at bar, after article IX-A amendment to the constitution of 1870 was adopted, the uniformity provisions of section 1 of article IX were no longer effective as to the taxation of per-

sonal property of individuals, and the court should have found no impediment to upholding the validity of article IX-A and the abolishment of this tax as to individuals.

Constitutional provisions requiring property to be taxed uniformly in proportion to its value are not uncommon to the state. In the California Railroad Tax cases (*San Mateo County v. Southern Pacific R. Co.*, C.C., 13 F. 722, appeal dismissed per stipulation, 116 U.S. 138, 6 S. Ct. 317, 29 L. Ed. 589; *Santa Clara County v. Southern Pacific R. Co.* C.C., 18 F. 385, *aff'd* other grounds, 118 U.S. 394, 6 S. Ct. 1132, 30 L. Ed. 118), which held that unequal taxation, based upon the character of the owner, was forbidden by the fourteenth amendment, a constitutional provision requiring uniformity of taxation was involved. Even though the California constitution specified that all property be taxed in proportion to its value, laws of the State especially provided that as to railroad properties only, the amount of a mortgage on the real estate was not to be deducted in ascertaining the value of the real estate for taxation purposes. The trial court quite properly held that this method of valuation, as to railroads only, was improper under the circumstances, and the United States Supreme Court affirmed the lower court on a nonconstitutional basis without reaching the constitutional question. The California railroad tax cases should be read, with cognizance, that the State constitution required all property to be taxed in proportion to its value, and that the cases arose at a time when it was necessary to establish that the word, "persons" as used in the fourteenth amendment, included corporations. Apparently, the latter point had a strong bearing on the expressions found in these cases.

In the case at bar, by virtue of the adoption of article IX-A, there is no constitutional requirement that taxes

on personal property be uniform as to individuals and corporations so that each pays a tax in proportion to the value of his or its property. Article IX-A, which we are called upon to consider, eliminated this requirement; it provides that "the taxation of personal property is prohibited as to individuals." Thus, the case at bar is a far cry from one in which the legislature is attempting to discriminate between individuals and corporations in the face of a constitutional provision prohibiting such discrimination. Here the question for determination is whether, absent the requirement of a State constitution that corporate and individual personal properties be taxed the same, the equal protection clause of the fourteenth amendment permits them to be taxed differently. I believe that it does!

Without the constitutional requirement of uniformity on the taxation of properties, there is no reason or justification in the case at bar for stating that personal property taxation may not be classified on the basis of ownership of the property. The constitution of 1870, as amended by article IX-A, does not so provide, and the constitution of 1970 suggests the contrary. Article IX of the constitution of 1970 relates to revenue, and section 5 therefore pertains to personal property taxation. Subsection (a) thereof provides that the legislature "may classify personal property for purpose of taxation by valuation, abolish such taxes on any or all *classes* and authorize the levy of taxes in lieu of the taxation of personal property by valuation." (Emphasis ours.) Without more, it could be said that the word, "classes" refers only to classes of property, but subsection (c) refers to the abolition of all *ad valorem* personal property taxes by January 1, 1979, and the replacement of the lost rev-

enue, and provides: "Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those *classes* relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971." (Emphasis ours.) Obviously, the word, "classes" as there used, does not refer to classes of property; it refers to classes of property owners and provides for taxation according to the character of the owner. If the majority opinion is to stand and article IX-A held to be unconstitutional, then under consistent application of its rationale, subsection (a) of section 5 of the new constitution is likewise unconstitutional.

The majority opinion chose to rely upon the rationale of *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927. I believe that the elucidation and logic of the dissent of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, offers the better reason. Therein, Mr. Justice Brandeis made some observations which are particularly apropos here. The court had under consideration a tax on the gross receipts of corporate taxicab companies where no similar tax was imposed upon the receipts of individuals who operated taxicabs. The majority held that the classification was based solely upon the character of the owner, and that it violated the fourteenth amendment.

In his dissenting opinion, 277 U.S. 389, 403-412, 48 S. Ct. 553, 555-558, 72 L. Ed. 927, 931-934, Mr. Justice Brandeis observed that the tax applied equally to all corporations foreign and domestic. He stated that the fundamental question before the court was:

"Does the equality clause prevent a state from imposing a heavier burden of taxation upon corpora-

tions engaged exclusively in intrastate commerce, than upon individuals engaged under like circumstances in the same kind of business? The narrower question presented is whether this heavier burden may be imposed by a form of tax 'not peculiarly applicable to corporations'; that is, by a tax of such a character that it might have been extended to individuals if the Legislature had seen fit to do so."

He then pointed out that the difference between a business carried on in corporate form and one carried on by natural persons is "a real and important one." He observed that the discrimination was not based upon any difference in the source of income or in the character of the property employed, and stated the obvious: that the requirement that a classification must be reasonable does not imply that the policy embodied in the classification must be deemed by the court to be a wise one. He concluded that a state is permitted to impose upon corporations more than their pro rata share of the burden of taxation, and that nothing in the Federal constitution prohibits this.

It seems that this is exactly what we held in *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E. 2d 633. We recognized what we called the obvious advantages of carrying on a business in the corporate form. The privilege of carrying on a business in this form has many advantages: the corporate ownership of business, freedom from personal liability for corporate obligations, continuity of existence, etc. There we acknowledged that there are sufficient differences between the privilege of earning or receiving income as a corporate entity and that of earning or receiving income as an individual, to justify the variance in tax rates between the individual and the corporation, and here we should recognize that there are sufficient differences between the privilege of owning property as a corporate entity and the privilege of owning it as an individual to justify the exemption in the case of the

individual property owner. The fact that the corporation may in some respects be placed at a disadvantage in its competition with individuals owning similar property and engaged in the same business should not condemn the classification as unreasonable. *Thorpe v. Mahin*, at p. 46, 250 N.E. 2d 633.

There is no more compelling reason to suggest that the classifications for personal property tax purposes must be based upon the nature of the property than there is to suggest that the classifications for income tax purposes must be based on the source or type of income to be reported. The article IX-A constitutional amendment creates a classification based upon the distinctions inherent between corporations and individuals—a distinction which we have recognized and upheld as valid under the equal protection clause requirement of the fourteenth amendment in *Thorpe v. Mahin*.

Another matter is worthy of mention in our consideration of this case. The evils and the inequities in the administration of the personal tax collections in this State are known to everyone. That these inequities apply with equal force to corporate taxpayers and individual taxpayers may, or may not, be totally true. The desire and purpose of systematically eliminating this archaic form of taxation are apparent from the actions of the people and the legislature of the State. The General Assembly, which drafted and adopted Senate Joint Resolution No. 30, had previously at the same legislative session already exempted from such taxation, household furniture and one automobile, per household, if used for personal pleasure. (Ill. Rev. Stat. 1969, ch. 120, para. 500.21a.) The article IX-A amendment was overwhelmingly ratified by the people of the State. The constitution of 1970, likewise adopted by the vote of the people, expressed concern over the form and use of personal property taxa-

tion. The newly-adopted constitution prohibits the reinstatement of any *ad valorem* personal property tax abolished before January 1, 1971, the effective date of the new constitution. This provision refers to the personal property tax as to individuals which was abolished by article IX-A, and the majority opinion runs counter to this constitutional prohibition in that it reinstates the personal property tax as to individuals. In addition, the new constitution provides that all *ad valorem* personal property taxes shall be abolished on or before January 1, 1979,

The obvious spirit of the article IX-A amendment, the will of the people, as expressed by its adoption, and the intent and purpose of the legislature, should not be thwarted unless a construction to this effect is required. Thus, it is very appropriate that we consider the mischief sought to be remedied and the purpose to be accomplished by the article IX-A amendment (*Wolfson v. Avery*, 6 Ill. 2d 78, 88, 126 N.E. 2d 701.) Likewise, the court should memorialize the salutary rule of law that an amendment to a State constitution should be deemed violative of the Federal constitution only where the asserted constitutional rights cannot otherwise be protected and effectuated. *Reynolds v. Sims*, 377 U.S. 533, 584, 84 S. Ct. 1362, 1393, 12 L. Ed. 2d 506, 540.

After considering the background of this constitutional amendment and the purpose which it, along with the other contemporary legislative enactments and constitutional adoptions, seeks to accomplish, I believe that the classification found in the article IX-A amendment does not constitute an invidious discrimination; that it seeks to accomplish and promote a valid policy expressive of the will of the people and the intent and purpose of the legislature; and that the distinction upon which the classification for exemption is based does not overstep the limitations imposed by the fourteenth amendment.

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT,
CHANCERY DIVISION

LAKE SHORE AUTO PARTS
CO., an Illinois corporation, on its
own behalf and also as representa-
tive of a class of corporations and
other "non-individuals", which
class is herein described,

Plaintiffs,

vs.

BERNARD J. KORZEN, County
Treasurer and ex-officio County
Collector of Cook County, GEOR-
GE E. KEANE and HARRY S.
SEMROW, Members of the Board
of Appeals of Cook County, P. J.
CULLERTON, County Assessor of
Cook County, EDWARD J. BAR-
RETT, County Clerk of Cook
County, and ROBERT J. LEN-
HAUSEN, Director, Department of
Local Government Affairs of the
State of Illinois.

NO. 70 CH 5123

ORDER

This cause coming on to be heard upon the Motion For
Summary Judgment of LAKE SHORE AUTO PARTS
CO. an Illinois corporation, plaintiff, by and through
its attorneys, ORLIKOFF, PRINS, FLAMM & SUSMAN,
and upon the Cross-motion For Summary Judgment of
defendant ROBERT J. LENHAUSEN, Director, Depart-

ment of Local Government Affairs of the State of Illinois, by and through the Attorney General of Illinois, and the Cross-motion For Summary Judgment of defendants KORZEN, KEANE, SEMROW, CULLERTON and BARRETT, assessing and taxing officials of Cook County, by and through the State's Attorney of Cook County.

The Court having examined the pleadings and memoranda filed by the parties hereto, having heard the arguments of counsel and being fully advised in the premises.

DOES HEREBY FIND:

1. That there is no genuine issue as to any material fact in this cause, and it is therefore appropriate and proper that the cause be determined on the Motion and Cross-motions For Summary Judgment.

2. That the plaintiff, LAKE SHORE AUTO PARTS CO., is a corporation duly organized and existing under the laws of Illinois, and on April 1, 1970, was the owner of personal property having a taxable situs in the County of Cook, which property has been included on the assessment roll now being prepared by the assessing officials of Cook County for the tax year 1970; that the plaintiff has standing to bring this action on its own behalf, and it is not at this time necessary or appropriate to determine whether the action is properly brought and maintained as a class action or to determine the definition of the plaintiff class.

3. That an amendment to the Illinois Constitution of 1870, designated as Article IX-A, was approved by the

people of Illinois at a referendum held on November 7, 1970, and such amendment, by its terms, became effective January 1 1971; that said Article IX-A purports to prohibit the taxation of personal property by valuation as to "individuals", and only as to "individuals", while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, § 482 et seq.) which impose such personal property taxes as to property owned by corporations and other "non-individuals".

4. That said Article IX-A is self-executing, and the necessary effect of the adoption thereof is to amend the various provisions of the Revenue Act of Illinois, specifically including but not limited to §18 thereof (Ill. Rev. Stat. 1969, ch. 120, §499), so as to exempt from personal property taxes thereby imposed all personal property owned by "individuals", while retaining such taxes as to personal property owned by corporations and other "non-individuals."

5. That the Revenue Act of Illinois, as so amended by Article IX-A of the Illinois Constitution, deprives the plaintiff corporation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States; that said Revenue Act of Illinois, to the extent that it purports to impose personal property taxes with respect to the property owned by plaintiff, is therefore unconstitutional, void and of no effect whatsoever.

6. That Article IX-A of the Illinois Constitution is not applicable with respect to personal property taxes imposed by the Revenue Act of Illinois for the year 1970, the assessment date for which was April 1, 1970, and the assessment of which had been commenced prior to Janu-

ary 1, 1971, the effective date of Article IX-A, notwithstanding that such assessment had not been completed as of that date:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

7. The plaintiff's Motion For Summary Judgment is granted in part and denied in part, the Court declaring that the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, §§ 482 et seq.), said Revenue Act having been amended by Article IX-A of the Illinois Constitution, is violative of the Fourteenth Amendment to the Constitution of the United States and is held to be void and unenforceable insofar as said Revenue Act purports to impose personal property taxes on plaintiff.

8. The defendants' Cross-motions For Summary Judgment are granted in part and are denied in part, the Court declared that Article IX-A of the Illinois Constitution is not applicable to, and does not impair the collection of, personal property taxes imposed by the Revenue Act of Illinois, the assessment of which were commenced prior to January 1, 1971.

9. Except for those matters adjudicated by paragraphs 7 and 8 of this Order, this Court retains jurisdiction of this cause for all purposes.

10. Pursuant to Rule 304(a) of the Rules of the Supreme Court of Illinois, the Court expressly finds that there is no just reason for delaying enforcement or appeal of this Order. In the event of an appeal from this Order, the Court is of the opinion that the interests of justice would be best served by hearing and deciding the appeal as expeditiously as possible because of the

manifest public importance of the issues and the substantial amount of tax revenues that are involved.

DATED:, 1971.

ENTER:

.....
 Judge, Circuit Court of Cook
 County, Illinois.

STATE OF ILLINOIS }
COUNTY OF COOK } ss

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT,
TAX DIVISION

CLEMENS K. SHAPIRO, JEROME HERMAN, d/b/a THE SPOT, GUY S. ROSS AND EUGENE D. ROSS, d/b/a GUY S. ROSS & CO., a partnership; and M. WEIL AND SONS, INC., an Illinois Corporation, all individually and in representative capacity,

Plaintiffs,

vs.

EDWARD J. BARRETT, County Clerk of Cook County; BERNARD J. KORZEN, County Treasurer and ex-officio County Collector of Cook County; GEORGE E. KEANE and HARRY H. SEMROW, Members of the Board of Appeals of Cook County; P. J. CULLERTON, County Assessor of Cook County, and ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois,

Defendants.

No. 71 L 5745

ORDER

This cause appears before this Court on plaintiffs' Complaint for Declaratory Judgment, filed pursuant to Chapter 110, Section 57.1 of the Civil Practice Act. The action was filed by plaintiffs for themselves and in a representative capacity on behalf of all other persons similarly situated. The cause comes on for hearing on separate motions, to strike and dismiss that complaint, filed by County and State defendants. Defendants have elected to stand on their motions.

No genuine issue as to any material fact emerges.

The plaintiffs are:

1. Clemens K. Shapiro, is a natural person, citizen and taxpayer of the State of Illinois, resident of and a salaried employee in the County of Cook wherein he owns personal property in his own name, and owns real property jointly with his wife, none of which property is owned or used in the operation of, or for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family.

2. Jerome Herman, is a natural person, and a citizen of the State of Illinois, and as sole proprietor owns, operates and conducts a business located in Cook County, Illinois, and is the owner of property and a taxpayer herein.

3. Guy S. Ross and Eugene D. Ross, natural persons, citizens and residents of the State of Illinois, both of whom are partners, and as partners operate and conduct a business as a partnership duly organized under the laws of the State of Illinois, which business entity is located in the County of Cook and is the owner of property and a taxpayer therein.

4. M. Weil and Sons, Inc., a corporation duly organized and existing under the laws of the State

of Illinois, is located in, and is the owner of property situated in the County of Cook and a taxpayer therein.

Each of the plaintiffs is an owner of property subject to the ad valorem tax directed to be imposed by Article IX of the Illinois Constitution of 1870, and imposed by the Illinois Revenue Act of 1939, which property has been assessed by valuation and continues to be so assessed by defendants pursuant to that constitutional and statutory authority.

The electorate of this State, on November 3, 1970, adopted amending Article IXA to the Illinois Constitution of 1870. This amendment became part of the Illinois Constitution on November 25, 1970, and reads as follows:

"Article IX-A

TAXATION OF PROPERTY

"§ 1. Taxation of personal property prohibited. Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*."

"SCHEDULE

"Paragraph 1. This amendment shall become effective January 1, 1971."

Plaintiffs contend as follows:

All plaintiffs contend that Illinois Constitution of 1870, as amended by the addition of Article IXA, specifically prohibits, and declares to be unconstitutional the imposition, in Illinois, of the property taxes imposed by Article IX, Section 1, on *all* forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner.

All plaintiffs contend that if Article IXA does not prohibit the taxation of all property, then Article IXA prohibits the tax to be measured by the value of the property taxed.

All plaintiffs contend that the prohibition of Article IXA, which abolishes the imposition of property tax measured by valuation of the property taxes, extends to those taxes so measured where the assessment of plaintiffs' property has been commenced by defendants prior to, even though not completed on January 1, 1971, the effective date of Article IXA, and payment due thereafter.

Natural Persons contend that:

The designation "individuals" in Article IXA properly and validly describes, is intended to apply, and does apply solely to them; and the taxation by valuation prohibited in Article IXA, if not applicable to all property owned by them, is applicable to personal property owned by them and used by them for their personal purposes; and that,

Article IXA prohibits taxation, by valuation of personal property as to them alone, while denying that prohibition as to all others, is proper, valid, and constitutional under both Illinois Constitution and the Constitution of the United States.

Both business entities and corporations contend that:

Article IXA, effective January 1, 1971, as an amendment to Illinois Constitution of 1870 is offensive to the Constitution of the United States.

If the designation "individuals" in Article IXA invokes prohibition of taxes by valuation on personal property exclusively as to "natural persons" and personal

property owned by them, but denies the same prohibition to business entities and corporations, then such classification is discriminatory, unreasonable and offensive both to Illinois Constitution and the Constitution of the United States. This is true for the reasons that such classification is invalidly predicated upon purported differences between *users* of identical property and the *use* to which the property is put, instead of differences found to exist between the forms of the property upon which that tax is directly laid. The employment of such base constitutes special legislation prohibited by Article IV, Section 22 of Illinois Constitution, as well as denying to business entities and corporations due process of law and the equal protection of the law guaranteed to them by Article II, Section 2 of the Illinois Constitution, and the Fourteenth Amendment to the Constitution of the United States.

Unless the exclusion of property owned by "individuals" is construed to exclude the property of business entities and corporations, as well as that of natural persons, then the employment in Article IXA of the term "individuals" is so vague, uncertain, and incapable of definitive application to the context of Article IX, that Article IXA must fall because it is totally absent the comprehension required, especially of constitutional provisions, by both Illinois Constitution and the Constitution of the United States.

Business entities contend that:

(a) The designation "individuals" in Article IXA correctly and properly described, and is intended to apply to, and does include business entities which own property because the natural person owners of that business entity are personally and individually liable for the payment of that tax.

Article IX-A prohibiting taxation by valuation of property owned by such business entities, while denying that prohibition as to corporations is proper, valid and constitutional under both Illinois' Constitution and the Constitution of the United States.

Corporations contend that:

If the designation "individuals" in Article IX-A applies to any or all owners of property except corporate owners of property, then such classification is discriminatory, unreasonable, and offensive to both the Illinois' Constitution and the Constitution of the United States.

Defendants contend that the taxation by valuation of real property and other property, as provided in Article IX shall continue and remain, in all regards, unaffected by Article IX-A, however:

Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited only as to natural persons; but as to them, only as to the personal property owned by them; but as to that personal property owned by them, only such of that property which is used by them for the personal judgment of themselves and their families.

This matter appearing on the pleadings aforesaid, presenting the issues to this Court as delineated by those pleadings, and the Court having heard argument by all parties in support of their respective positions, THIS COURT FINDS:

1. That a genuine cause and controversy exists, and that this action is properly maintained under the provisions of Chapter 110, Section 57.1 (Declaratory Judgments), Civil Practice Act, Illinois Revised Statutes, 1969.
2. Each of these plaintiffs has standing to bring this action in his or its own behalf and is a proper representative of his class.

3. That this action is properly maintained as a class action and the members of those classes are adequately and competently represented by counsel herein.

4. That Article IX-A of the Illinois Constitution of 1870 is valid, constitutional and immune to all of the plaintiffs' assaults, both under the Illinois Constitution and the Constitution of the United States.

5. That Article IX-A is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families.

6. That these findings by this Court make it unnecessary to consider contentions made by plaintiffs in the alternative.

7. That all issues as found heretofore are found in favor of the defendants, except as to those issues relating to the plaintiff Clemens K. Shapiro and members of his class involving personal property owned and used by them for the personal enjoyment of themselves and their families.

8. That motions to strike and dismiss plaintiffs' Complaint are sustained in regards and in respect of those found in favor of the defendants, except as to those issues raised by plaintiff Clemens K. Shapiro and members of his class involving personal property owned and used by them for the personal enjoyment of themselves and their families.

9. Pursuant to Rule 304(a) of the Rules of the Supreme Court of Illinois, the Court expressly finds that there is no just reason for delaying enforcement or appeal of this Order. In the event of an appeal from this Order, the Court is of the opinion that the interests of justice would be best served by hearing and deciding the appeal as expeditiously as possible because of the manifest public importance of the issues and the substantial amount of tax revenues that are involved.

WHEREFORE, IT IS ORDERED, ADJUDGED and DECREED that defendants' motions to strike and dismiss are sustained as to all plaintiffs, except the plaintiff Clemens K. Shapiro and members of his class, and plaintiffs' Complaint is stricken as to all issues and in all regards and respect contrary to and in variance with the judgment of this Court; that Amending Article IX-A of the Illinois Constitution is valid and constitutional in all respects and is immune to attack under any provision or provisions of the Illinois Constitution of 1870 and the United States Constitution, and that said Amending Article IX-A declares its prohibition exclusively as to any personal property tax on the personal property owned by individuals and used for their personal enjoyment and that of their families.

ENTER:

THOMAS C. DONOVAN,
Presiding Judge, Tax Division,
Circuit Court of Cook County,
Illinois.

Date: May 27, 1971.

FILE COPY

Supreme Court, U.S.

FILED

NOV 20 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1971

No. **71-685**

ROBERT J. LEHNHAUSEN,

Petitioner,

VS.

LAKE SHORE AUTO PARTS, et al.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
ILLINOIS SUPREME COURT**

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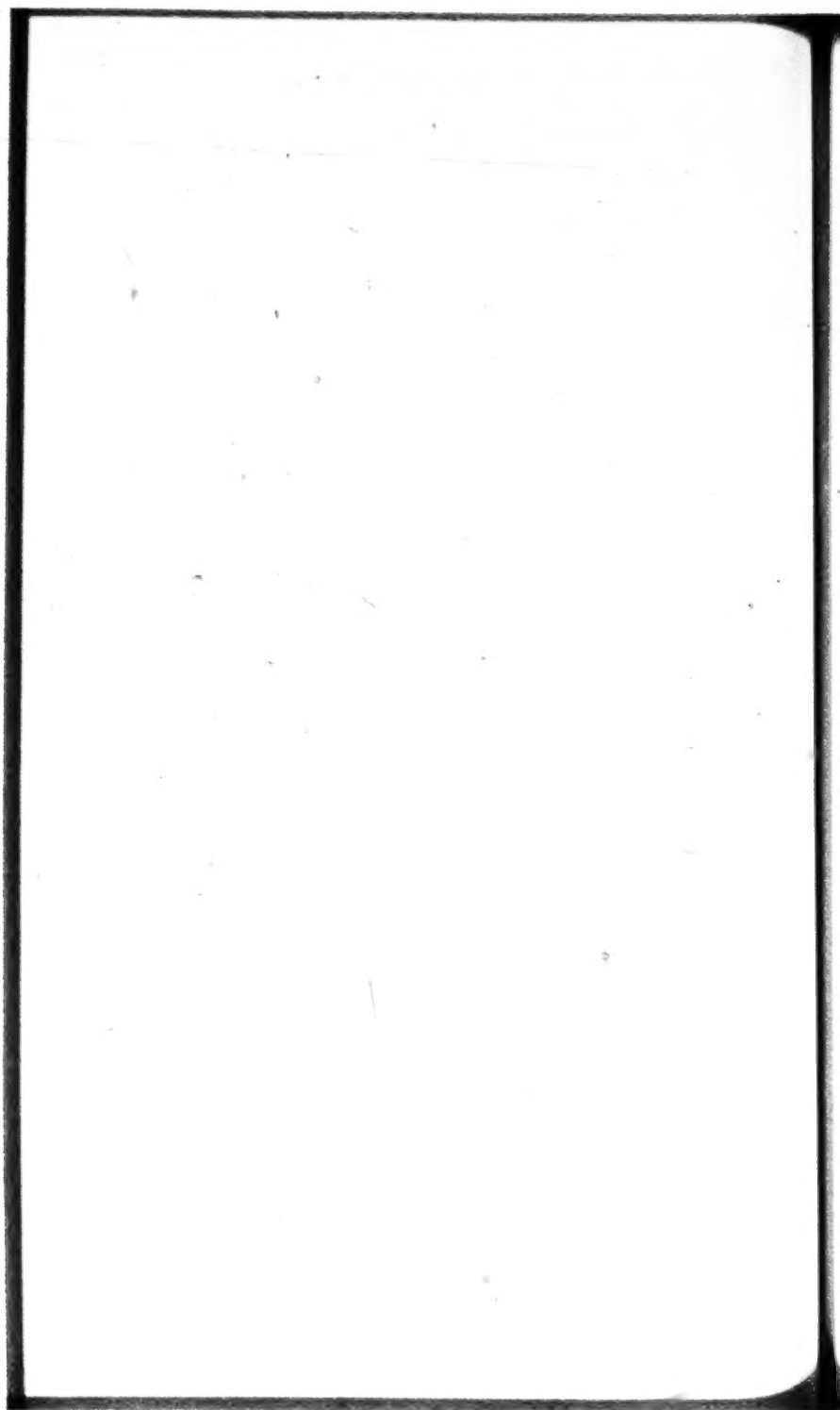
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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1971

No.

ROBERT J. LEHNHAUSEN,

Petitioner,

VS.

LAKE SHORE AUTO PARTS, et al.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
ILLINOIS SUPREME COURT**

Petitioner, Robert J. Lehnhausen, Director of the Department of Local Government Affairs, State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Supreme Court entered in this proceeding on July 9, 1971, holding Article IX-A of the 1870 State Constitution in contravention of the Fourteenth Amendment to the United States Constitution, and the dissenting opinion entered in this proceeding on July 26, 1971.

Petitioner respectfully submits this petition in accordance with Rules 21, 22 and 23 of the Revised Rules of the United States Supreme Court to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINIONS BELOW

The decision of the Illinois Supreme Court which is the subject of this appeal is not yet officially reported. A complete copy of the decision and the dissent filed therewith is attached to this petition as Appendix "A". The two lower court decisions involved are also attached. The decision of Judge Dahl of the Cook County Circuit Court in the *Lake Shore Auto Parts v. Korzen* case is attached as Appendix "B", and the decision of Judge Donovan of the Circuit Court of Cook County in the *Clemens K. Shapiro, et al. v. Edward J. Barrett et al.* case is attached as Appendix "C".

JURISDICTION

The opinion filed July 9, 1971, and the dissent, filed July 26, 1971, related to a consolidation of three cases, two of which arose in the Circuit Court of Cook County, Illinois, and proceeded to the Supreme Court of Illinois by direct appeal; the third was an original action in the Supreme Court of Illinois.

A Petition for Rehearing was filed by petitioner herein on July 30, 1971. It was denied on August 24, 1971.

The majority opinion held that Article IX-A of the 1870 Constitution contravened the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. Jurisdiction of this Court to review this decision by Writ of Certiorari is conferred by 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IX-A of the 1870 Illinois Constitution, submitted to the electorate on November 3, 1970 and declared ratified on November 25, 1970, the text of which is set forth below, was found by the Illinois Supreme Court to contravene the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

"Article IX-A

TAXATION OF PROPERTY

"§1. Taxation of personal property prohibited.

"Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*"

"SCHEDULE

"Paragraph 1. This amendment shall become effective January 1, 1971."

"EXPLANATION OF AMENDMENT

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not effect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870 Article IX-A, thus setting aside existing provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

QUESTION PRESENTED

Whether a State may, consistent with the Equal Protection Clause of the Fourteenth Amendment, abolish the *ad valorem* personal property tax with respect to individuals, but retain such tax as it applies to non-individuals?

STATEMENT OF FACTS

There is apparently no dispute as to the facts.

Prior to January 1, 1971, Section 1 of Article IX of the Illinois Constitution of 1870 provided as follows:

"Taxation of Property—Occupations—Privileges.

§ 1. The General Assembly shall provide such revenue as may be needful, by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion of his, her, or its property—such value to be ascertained by some person or

persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor-dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates."

Pursuant to this constitutional provision, an *ad valorem* personal property tax was imposed upon all entities, individuals, partnerships, corporations, etc. on the value of their personal property. It is a matter of public record in the State of Illinois that this tax has been most inequitable and has lacked uniformity and consistency in its application to the taxpayers of this State. The personal property tax, if enforced, assessed and collected as provided for by law would have been confiscatory in most instances. It has been, through the years, assessed and collected in an unconstitutional manner.

The State of Illinois is divided into three population centers, spread over 102 counties. Cook County has a population approximately equal to the 101 "downstate" counties (many of the "downstate" counties actually lie north or northwest of Cook County), and a financial worth far in excess of the total of the other 101 counties. Cook County is divided into the City of Chicago (the second largest city in the United States) and the Cook County suburban area. Except as to corporations and a few very large businesses (non-incorporated), personal property taxes have neither been assessed nor collected with-

in the City of Chicago. Such is not true within the Cook County suburban area, nor is it true in the 101 "downstate" counties. Even in the areas where the personal property taxes were assessed and collected, they were not collected in accordance with the provisions of the law, nor with any regard to equity or uniformity. For example, Maurice W. Scott, Executive Vice President of the Taxpayers' Federation of Illinois, testified in public hearing before the members of the Illinois House Revenue Committee on September 8, 1971, that the *ad valorem* personal property tax as it was on November 2, 1970, actually collected the following amounts:

(a) *Cook County—*

Personal property tax on corporations	\$126,000,000
Personal property tax on unincorporated business	13,000,000
Personal property tax on individuals	2,000,000
	<hr/>
	\$141,000,000

(b) *Downstate Counties—*

Personal property tax on corporations	\$111,000,000
Personal property tax on unincorporated business	20,000,000
Personal property tax on individuals	27,000,000
	<hr/>
	\$158,000,000

At that same Committee hearing, State Representative Harber Hall (R. — Normal) stated "The farmers down my way are refusing to disclose what they own. Some are not even letting assessors on the premises. I get the distinct feeling that people are just not going to pay the personal property tax this year, no matter what."

The 1970 census figures of the United States Government show Cook County with a population of 5,427,237 and a total State population of 10,977,908. This means there is a total population in the 101 counties, excluding Cook County of 5,550,671. With the population almost equally divided between Cook County and the 101 "down-state" counties, the personal property taxes collected from individuals in Cook County in 1970 was \$2,000,000, as against \$27,000,000 collected from individuals in all the other 101 counties.

It is these figures which prompt public officials to describe the personal property tax in Illinois as a most onerous tax, impossible of fair administration.

This defendant has been advised by the State's Attorney of Rock Island County that, in spite of the decision which this petitioner is requesting this Court to review (ordering that personal property taxes be collected from individuals as well as corporations), Rock Island County (which is one of the larger counties in the state) will not make any attempt to collect personal property taxes from individuals.

As State Representative Harber Hall, a member of the Illinois House Revenue Committee, indicated at the public hearing on September 8, 1971, if the personal property tax situation is not remedied, there will be a taxpayers' revolt of major proportions.

The testimony of Maurice W. Scott containing the dollar amounts stated herein are contained in Appendix E, being a typewritten statement of his testimony before the House Revenue Committee on September 8, 1971.

The refusal of Rock Island County to collect the personal property tax is contained in a letter to this petitioner directed to the State's Attorney of Rock Island

County under date of August 19, 1971, being Appendix F.

This defendant requests this Court to take judicial notice of the 1970 census figures for Cook County and the State of Illinois as compiled by the Federal Government.

Justice Davis in his dissent understated the case when he said:

“* * * The evils and inequities in the administration of the personal property tax collections in this State are known to everyone. That these inequities apply with equal force to corporate taxpayers and individual taxpayers may, or may not, be totally true. The desire and purpose of systematically eliminating this archaic form of taxation is apparent from the actions of the people and the legislature of the State. The General Assembly, which drafted and adopted Senate Joint Resolution No. 30, had previously at the same legislative session already exempted from such taxation, household furniture and one automobile per household, used for personal pleasure. (Ill. Rev. Stat. 1969, ch. 120, par. 500.21a) The Article IX-A amendment was overwhelmingly ratified by the people of the State. The Constitution of 1970, likewise adopted by the vote of the people, expressed their concern over the form and use of personal property taxation. The newly-adopted constitution prohibits the reinstatement of any *ad valorem* personal property tax abolished before July 1, 1971, the effective date of the new constitution. This provision refers to the personal property tax as to individuals which was abolished by Article IX-A and the majority opinion runs counter to this constitutional prohibition in that it reinstates the personal property tax as to individuals. In addition, the new constitution provides that all *ad valorem* personal property taxes shall be abolished on or before January 1, 1979.

"The obvious spirit of the Article IX-A amendment, the will of the people, as expressed by its adoption, and the intent and purpose of the legislature, should not be thwarted unless a construction to this effect is required. Thus, it is very appropriate that we consider the mischief sought to be remedied and the purpose to be accomplished by the Article IX-A amendment. (*Wolfson v. Avery*, 6 Ill. 2d 78, 88). Likewise, the court should memorialize the salutary rule of law that an amendment to a state constitution should be deemed violative of the Federal Constitution only where the asserted constitutional rights cannot otherwise be protected and effectuated. *Reynolds v. Simms*, 377 U.S. 533, 584, 84 S. Ct. 1362, —, 12 L. ed. 2d 506, 540."

So unenforceable within the terms and requirements of Section 1 of Article IX of the Illinois Constitution of 1870 was the assessment and collection of the personal property tax, that the Office of the Assessor of Cook County consistently distributed two forms; one for individuals who are proprietors or partners in unincorporated businesses, to include only property belonging to the business (designated as form No. 200B). For the individual listing property such as household goods and non-income-producing property, a separate form (No. 200A) was issued.

With this historical background, this Court's attention should be directed to the attempts of the electorate and the legislature to remedy the invidious discrimination that existed (and still exists as a result of the Illinois Supreme Court decision) in the assessment, enforcement and collection of the Illinois Personal Property Tax.

In 1969 the Illinois legislature passed a law which provides for the exemption of household goods and one auto-

mobile from the personal property tax. Ch. 120 § 500.21a Ill. Rev. Stat. 1969. At the same session of the Illinois legislature, a joint resolution was drafted and adopted proposing Article IX-A as an amendment to the Illinois Constitution of 1870. That Article, its explanations and further clarifying resolutions of the General Assembly were as follows:

"AMENDMENT

to the

CONSTITUTION OF ILLINOIS

THAT WILL BE SUBMITTED TO THE VOTERS

NOVEMBER 3, 1970

This folder includes

**PROPOSED AMENDMENT TO THE
CONSTITUTION, EXPLANATION OF PROPOSED
AMENDMENT ARGUMENTS IN FAVOR OF
PROPOSED AMENDMENT
ARGUMENTS AGAINST
PROPOSED AMENDMENT
FORM OF BALLOT**

(Seal of the State of Illinois)

Published in compliance with Statute

by

PAUL POWELL

Secretary of State

"To the Electors of the State of Illinois:

At the general election to be held on the 3rd day of November, 1970 a blue ballot will be given to you and you will be called upon in your sovereign capacity as citizens to adopt or reject the following proposed amendment to the Constitution of Illinois.

PROPOSED AMENDMENT TO ADD

ARTICLE IX-A

(Prohibition of taxation of personal property by valuation as to individuals.)

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971."

"EXPLANATION OF AMENDMENT

(See Form of Ballot)

ARGUMENTS IN FAVOR OF THE
PROPOSED AMENDMENT

"The purpose of the proposed addition of Article IX-A to the Constitution is to abolish the unfair and unworkable taxation of personal property of individuals throughout Illinois.

The present taxation of personal property of individuals is unfair because:

"—It is not evenly administered, and cannot be. Variations in assessment practices from one assessing district to another are extreme, and result in unfair treatment of some taxpayers while others virtually escape any taxation of this kind. Individuals comprising about a third of the population of the State pay no personal property taxes whatever, while the rest pay taxes on their automobiles, on their household furniture, in some cases on their bank accounts and other financial resources, and, in rural areas, on their livestock, grain, farm implements, etc."

“—The taxation of personal property is a relic of the 19th century, when agriculture was the predominate occupation in the State, when a man's worth and ability to pay could be measured by his material possessions, when intangible assets were not at all common, and when personal property could not be easily hidden from assessors. Things are different today. Intangible assets are common, but not easily assessed and taxed. Thus, personal property taxation is now made, for the most part, of necessities of modern life such as family automobiles and a family's furniture.

“—Personal property taxation encourages cheating and evasion. Virtually every property taxpayer in the State perjures himself every year because he does not report all of his personal property to the assessor. This built-in feature of personal property taxation cannot be otherwise than to aid and abet the disintegration of the moral values of our society which we have cherished for so long and which we see slipping away day by day.”

“If adopted by the people of Illinois, this amendment to our Constitution will:

“—Remove the necessity of cheating on taxes, remove the impossible demands now placed on assessors to achieve fair taxation, and, above all, remove an onerous and universally depised tax program.

“—Modernize the revenue provisions of our Constitution, an objective of which the people of Illinois have indicated they are heartily in favor.

“The abolition of personal property taxation should be accomplished by constitutional reform. It should not be left to statutory action, which cannot be permanent in nature and which most certainly would lead to continuous court action and indecision as to exactly what was intended.”

“Even the placing of this question on the ballot for the people to consider has been a powerful indication to Illinois' constitutional convention delegates that

the people prefer to end this unfair kind of taxation. At the time these arguments in favor of amending the Constitution were prepared, it could not be known what the constitutional convention's final decision on personal property taxation would be. But adoption of this amendment will indicate, once and for all time, that the people are fed up with unfair taxation.

"The loss of revenue to local governments in Illinois if personal property taxation of individuals is abolished will be considerable, to be sure. But modernization of our entire tax system will make possible replacement of this needed revenue through other, fairer, sources.

"In short, there is no compelling argument which can now be raised against adoption of this amendment. And there is every reason to support it."

"ARGUMENTS AGAINST THE PROPOSED AMENDMENT"

"There is no question of the dissatisfaction with the taxation of personal property at present in Illinois. It is discriminatory, it is unfair, it is almost impossible to administer, and it is economically unsound. But the same can be said of the proposed amendment, and moreover the amendment, if adopted, could be injurious to the finances of local governments because it makes no provision for the replacement of the lost revenues.

"—It is discriminatory because it creates a tax liability based on the nature of the ownership of property and not because of the nature of the property itself. That which is owned by or held in a fiduciary capacity for the benefit of natural persons is exempted from taxes; that which is owned by corporations, etc., is subject to taxes. How will this affect a piece of equipment still titled to the original own-

er, a corporation, while the user makes payments on it? Business interests generally will be at a disadvantage under this amendment."

"—It is unfair because it gives no relief to merchants and manufacturers whose inventories are now subject to tax, depending on the practice of the assessor in their locale, so that they may be at a competitive disadvantage with merchants elsewhere and, in the case of industry, with out of State manufacturers.

"—It will be almost impossible to administer the amended tax equally because the location of some kinds of personalty, such as shares of intangibles not owned by individuals, which can be shifted out of the State, but this is not true for tangible personalty—machinery, equipment, etc.—owned by a corporation.

"—It is economically unsound because it places a burden on the corporate form of business organization. Under the new State income tax law, corporations are taxed at a higher rate than individuals; why should they be subjected to the continued personal property tax when individuals are not?"

"—It will be injurious to local governments because no provision is made to replace the lost revenue. It is estimated that from 6 to 7 percent of all property on the tax rolls now falls in the class of individually owned personal property that will be exempted. Where will this loss of revenue (about \$140,000,000) be made up? By raising real estate taxes? The income tax proceeds are being shared with cities and counties; what about other types of local governments? How will they make up the difference?

"The amendment should be defeated. The only useful purpose it can serve is to induce the Constitutional Convention to provide a fair, equitable, and administratively sound tax system, with an allocation

of revenues to local governments to replace any loss from discontinuing or modifying the present system of personal property taxation."

**"FORM OF BALLOT
PROPOSED AMENDMENT TO ADD
ARTICLE IX-A**

(Prohibition of taxation of personal
property by valuation as to individuals.)

EXPLANATION OF AMENDMENT

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870. Article IX-A, thus setting aside existing provisions in Article IX, section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations.

"Place an X in blank opposite "Yes" or "No" to indicate your choice.

- ☐ YES For the proposed amendment to add Article IX-A to the Constitution. (Prohibition of
- ☐ NO taxation of personal property by valuation as to individuals.)"

**"CAPITOL BUILDING
SPRINGFIELD, ILLINOIS**

OFFICE OF THE SECRETARY OF STATE

"I, PAUL POWELL, Secretary of State of the State of Illinois, do hereby certify that the foregoing contains a true and correct copy of the proposed amendment, the explanation of the proposed amendment, the arguments in favor of the proposed amendment, the arguments against proposed amendment and the

form in which said amendment will appear upon a separate blue ballot pursuant to Senate Joint Resolution No. 30 of the Seventy-sixth General Assembly, the original of which is on file in this office.

"IN WITNESS WHEREOF, I hereunto set my hand and affix the Great Seal of the State of Illinois. Done at my office in the Capitol Building in the city of Springfield this 27th day of February A.D. 1970, and of the Independence of the United States the one hundred and ninety-fourth.
PAUL POWELL,

Secretary of State"

(SEAL)

At the general elections in November of 1969, Article IX-A as an amendment to the Illinois Constitution of 1870 was overwhelmingly ratified by the people of the State of Illinois by a ratio of between eight or seven to one. At a general election on December 15, 1970, the people of the State of Illinois ratified the Illinois Constitution of 1970, which contained a revenue article which provides as follows:

"SECTION 1. STATE REVENUE POWER

The General Assembly has the exclusive power to raise revenue by law except as limited or otherwise provided in this Constitution. The power of taxation shall not be surrendered, suspended, or contracted away.

"SECTION 2. NON-PROPERTY TAXES—CLASSIFICATION, EXEMPTIONS, DEDUCTIONS, ALLOWANCES AND CREDITS

In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each

class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

"SECTION 3. LIMITATIONS ON INCOME TAXATION

(a) A tax on or measured by income shall be at a non-graduated rate. At any one time there may be no more than one such tax imposed by the State for State purposes on individuals and one such tax so imposed on corporations. In any such tax imposed upon corporations the rate shall not exceed the rate imposed on individuals by more than a ratio of 8 to 5.

"(b) Laws imposing taxes on or measured by income may adopt by reference provisions of the laws and regulations of the United States, as they then exist or thereafter may be changed, for the purpose of arriving at the amount of income upon which the tax is imposed."

SECTION 4. REAL PROPERTY TAXATION

(a) Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.

"(b) Subject to such limitations as the General Assembly may hereafter prescribe by law, counties with a population of more than 200,000 may classify or to continue to classify real property for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class. The level of assessment or rate of tax of the highest class in a county shall not exceed two and one-half times the level of assessment or rate of tax of the lowest class in that county. Real property used in farming in a county shall not be assessed at a higher level of assessment than single family residential real property in that county.

"(c) Any depreciation in the value of real estate occasioned by a public easement may be deducted in assessing such property."

"SECTION 5. PERSONAL PROPERTY TAXATION

(a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.

"(b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.

"(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes shall not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3(a) of this Article."

"SECTION 6. EXEMPTIONS FROM PROPERTY TAXATION

The General Assembly by law may exempt from taxation only the property of the State, units of local governmental and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes. The General Assembly by law may grant homestead exemptions or rent credits.

"SECTION 7. OVERLAPPING TAXING DISTRICTS

The General Assembly may provide by law for fair apportionment of the burden of taxation of property situated in taxing districts that lie in more than one county.

"SECTION 8. TAX SALES

(a) Real property shall not be sold for the non-payment of taxes or special assessments without judicial proceedings.

"(b) The right of redemption from all sales of real estate for the non-payment of taxes or special assessments shall exist in favor of owners and persons interested in such real estate for not less than two years following such sales. Owners, occupants and parties interested shall be given reasonable notice of the sale and the date of expiration of the period of redemption as the General Assembly provides by law."

"SECTION 9. STATE DEBT

(a) No State debt shall be incurred except as provided in this Section. For the purpose of this Section, "State debt" means bonds or other evidences of indebtedness which are secured by the full faith and credit of the State or are required to be repaid, directly or indirectly, from tax revenue and which are incurred by the State, any department, authority, public corporation or quasi-public corporation of the State, any State college or university, or any other public agency treated by the State, but not by units of local government, or school districts.

"(b) State debt for specific purposes may be incurred or the payment of State or other debt guaranteed in such amounts as may be provided either in a law passed by the vote of three-fifths of the members elected to each house of the General Assembly or in a law approved by a majority of the electors voting on the question at the next general

election following passage. Any law providing for the incurring or guaranteeing of debt shall set forth the specific purposes and the manner of repayment."

"(c) State debt in anticipation of revenues to be collected in a fiscal year may be incurred by law in an amount not exceeding 5% of the State's appropriations for that fiscal year. Such debt shall be retired from the revenues realized in that fiscal year.

"(d) State debt may be incurred by law in an amount not exceeding 15% of the State's appropriations for that fiscal year to meet deficits caused by emergencies or failures of revenue. Such law shall provide that the debt be repaid within one year of the date it is incurred.

"(e) State debt may be incurred by law to refund outstanding State debt if the refunding debt matures within the term of the outstanding State debt.

"(f) The State, departments, authorities, public corporations and quasi-public corporations of the State, the State colleges and universities and other public agencies created by the State, may issue bonds or other evidences of indebtedness which are not secured by the full faith and credit or tax revenue of the State nor required to be repaid, directly or indirectly, from tax revenue, for such purposes and in such amounts as may be authorized by law."

"SECTION 10. REVENUE ARTICLE NOT LIMITED

This Article is not qualified or limited by the provisions of Article VII of this Constitution concerning the size of the majorities in the General Assembly necessary to deny or limit the power to tax granted to units of local government."

The instant case is a consolidation of three separate law suits. The first was a case entitled *Lake Shore Auto Parts Co., an Illinois corporation, et al. v. Bernard J. Korzen, County Collector of Cook County, et al.* (Appen-

dix B). In this case the attack was not upon the constitutionality of Article IX-A, but upon the effect it had upon the Revenue Article of the State of Illinois as it pertained to assessment and collection of personal property taxes. Judge Dahl, in his memorandum decision held that the removal of personal property taxes from individuals and not from corporations rendered the revenue act unconstitutional and that no personal property taxes could be collected.

Subsequently, an original action was filed in the Illinois Supreme Court entitled *Eugene L. Maynard, et al. v. Edward J. Barrett, County Clerk of Cook County, et al.* This action challenged the constitutionality and validity of the amendment to the Illinois Constitution of 1870 designated as Article IX-A.

Subsequently, a third action was instituted in the Circuit Court of Cook County entitled *Clemens K. Shapiro, et al. v. Edward J. Barrett, County Clerk of Cook County et al.* In this case, Judge Donovan ruled that Article IX-A, being an amendment to the Illinois Constitution of 1870 was constitutional and exempted from personal property taxation only such personal property owned by individuals that was used for their personal enjoyment and that of their families. (Appendix C).

These three actions were consolidated for hearing by the Illinois Supreme Court and that Court on July 19, 1971 rendered its decision (Appendix A), finding that Article IX-A, being an amendment to the Illinois Constitution of 1870 violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The effect of this decision was to reimpose the original Article IX of the Illinois Constitution of 1870 and to reinstate personal property taxes on both individuals and other legal entities, including corporations.

ARGUMENT

I.

IT IS IMPROPER TO HOLD A STATUTE OR CONSTITUTIONAL PROVISION UNCONSTITUTIONAL WHEN THERE IS AN ALTERNATIVE, REASONABLE BASIS FOR HOLDING IT CONSTITUTIONAL

This defendant submits that the court below ignored the basic rule of statutory construction that a court will not opt for an interpretation which will render a statute unconstitutional if there is any fair reading of it which would keep it within the framework of the Constitution. *U. S. v. Cohn Grocery Co.*, 255 U.S. 81, _____ (1920). In *Flemming v. Nestor*, 363 U.S. 603; 80 S. Ct. 1367; 4 L. Ed. 2d 1435 (1960) this Court stated:

“We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute’s setting which will invalidate it over that which will save it. ‘[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void.’” *Fletcher v. Peck* (US) 6 Cranch 87, 128, 3 L. Ed. 162, 175. 363 U.S. 617.

In *U. S. v. National Dairy Products Co., et al.*, 372 U.S. 29; 84 S. Ct. 594; 9 L. Ed. 2d 561, reh. den. 372 U.S. 961; 83 S. Ct. 1011; 10 L. Ed. 2d 13 (1963), this Court stated:

"The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. E.g., *Jordan v. DeGeorge*, 341 U.S. 223, 231, 95 L. Ed. 886, 892, 71 S. Ct. 703 (1951), and *United States v. Petrillo*, 332 U.S. 1, 7, 91 L. Ed. 1877, 1882, 67 S. Ct. 1538 (1947). Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation." (Citations omitted).

It is submitted that an amendment to the Constitution of the State of Illinois overwhelmingly ratified by the electorate is entitled to be treated and considered under the same basic rule of statutory construction; that the Court will not opt for an interpretation which will render the constitutional amendment unconstitutional under the Constitution of the United States.

Justice Davis in his dissent found a reasonable alternative to finding Article IX-A (the amendment to the Constitution of the State of Illinois of 1870) unconstitutional. It is further submitted that the decision of Judge Donovan in the *Shapiro* case, (App. C) found an alternative ground on which to sustain the validity of this constitutional amendment. It is submitted that the majority of the court below strained to find a basis for holding Article IX-A unconstitutional and departed from their own pronouncements (see *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E. 2d 633 (1969) that there is a reasonable basis to distinguish between corporations and individuals.

II.

**THE COURT HAS CONSISTENTLY GRANTED STATE
LEGISLATURES BROAD POWERS IN ADOPTING
SCHEMES OF STATE TAXATION AND THE
COURT BELOW ERRED IN FINDING THAT ARTI-
CLE IX-A OF THE ILLINOIS CONSTITUTION OF
1870 VIOLATED THE EQUAL PROTECTION
CLAUSE OF THE FOURTEENTH AMENDMENT**

Before calling on the specifics of this defendant's argument, defendant suggests to this Court that it should consider the numerous decisions in which it has been called upon during the past century to pass upon the constitutionality of taxing schemes of the various states of this Union. The decision of the majority of the court below recognized the flexibility which this Court has granted to the states in adopting schemes of taxation and stated in its opinion:

"The Supreme Court of the United States has thus described the governing principles:

'Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237; *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283,

293; * * * *State Board of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537, 540, 543, 75 L. Ed. 1248. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basis principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co. v. Conway*, supra, 281 U.S. at 159.

'But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of legislation.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37; *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 231 U.S. 146, 160 * * *'

Allied Stores of Ohio, Inc. v. Bowers, (1959, 358 U.S. 522, 526-27, 79 S. Ct. 437, 3 L. Ed. 2d 480, 484-85. (Appendix A p. A12-13).

It is interesting to note that the majority decision cited *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959) and yet apparently ignored its significance. Of the cases cited by the majority, this is one of the few arising out of *ad valorem* personal property taxes.

An Ohio statute taxed the property of Ohio residents stored in Ohio warehouses, but allowed the property of non-residents of Ohio to be stored free.

The Court, speaking through Justice Whittaker, held this statute not to be a denial of equal protection because the Court could assume that the statute was enacted to

encourage out-of-state investment, a valid purpose for classification.

"We cannot assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy of the State. What were the special reasons, motives or policies of the Ohio Legislature for adopting the questioned proviso we do not know with certainty, *Southwestern Oil Co. v. Texas*, 217 U.S. 114, 126, for a state legislature need not explicitly declare its purpose. But it is obvious that it may reasonably have been the purpose and policy of the State Legislatures, in adopting the proviso, to encourage the construction or leasing and operation of warehouses in Ohio by nonresidents with the attendant benefits to the State's economy, or to stimulate the market for merchandise and agricultural products produced in Ohio by enabling nonresidents to purchase and hold them in the State for storage only, free from taxes in anticipation of future needs." (358 U.S. p. 528).

Justice Brennan, joined by Justice Harlan, wrote a separate concurring opinion stressing his belief that the Equal Protection Clause is "an instrument of federalism" and allows each state to experiment with its tax laws. Justice Stewart did not take part in the decision.

It is noteworthy that neither opinion discussed the contention (apparently made in Allied Stores' brief) that Ohio could not classify property for taxation on the basis of "residence of the owner." The majority decision also appears to have ignored the judgment of this Court in *Ohio Oil Co. v. Conway*, 74 L. Ed. 775; 281 U.S. 146 (1930), wherein this Court stated:

"When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guaranties of the Federal Constitution, the states have the attribute of

sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the 14th Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may tax real and personal property in a different manner. It may grant exemptions. The state is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the 14th Amendment was intended to assure." (281 U.S. at 159).

It is submitted that the issues in this case are:—(1) Was the majority of the Illinois Supreme Court correct when it held that any distinction between individuals and corporations with the imposition of *ad valorem* personal property taxes was an invidious and unreasonable distinction; (2) Was Justice Davis correct in his dissent when he held that it was reasonable to distinguish between all individually owned personal property as against all corporately owned personal property; or (3) Was Judge Donovan in error when he ruled that it is reasonable to exempt from the *ad valorem* personal property taxes "the personal property owned by individuals and used for their personal enjoyment and that of their families" and had to continue the tax upon the property of

individuals, partnerships and corporations which is used for business and profit making purposes. Defendant respectfully submits that either the dissent of Justice Davis or the decision of Judge Donovan are reasonable interpretations of the amendment (Article IX-A) to the Illinois Constitution of 1870 and fall clearly within the basic rule of statutory construction that this Court will not adopt an interpretation which would render a statute unconstitutional, as either of those decisions would keep this amendment within the framework of the Constitution of these United States (see *U.S. v. Cohn Grocery Co.*, *supra.*).

III.

THE COURT BELOW ERRED IN FINDING THAT ARTICLE IX-A OF THE ILLINOIS CONSTITUTION OF 1870 CREATED AN INVIDIOUS DISCRIMINATION AND, THEREFORE, VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The majority decision apparently holds that to classify property solely on the basis of ownership creates an invidious discrimination and is, therefore, unconstitutional. This defendant suggests that this ruling is directly contrary to the Court's decision in *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E. 2d 633 (1969), where the Supreme Court of Illinois held that classification of corporations as opposed to individuals was reasonable.

It is submitted that if a classification, whether it be for tax purposes or for any other purpose, conforms with the constitutional requirements of fairness and reason-

ableness and does not violate principles of due and equal protection, then that classification is unimpeachable. *Cipriano v. City of Houma*, 286 F. Supp. 823, (1965), *Edelen v. Hogsett*, 254 N.E. 2d 435, 44 Ill. 2d 215, (1969).

The notion that a legislature may make distinctions and classifications for taxation purposes is a fundamental precept. In *New York Rapid Transit Corporation v. City of New York* and its companion case, *Brooklyn E. Queens Transit Corp. v. City of New York*, 303 U.S. 573, 82 L. Ed. 1024 (1937), the U. S. Supreme Court declared that a state may subject a corporation to a separate or higher income tax than individuals or other corporations. In that case, Mr. Justice Reed, in handing down the court's decision, stated:

"* * * A state may exercise a wide discretion in selecting the subjects of taxation, particularly as respects occupation taxes." (303 U.S. at 578).

The Illinois General Assembly possesses plenary power over taxation, which power has never been limited by either the state or federal constitutions. Pursuant to that power of taxation, the Illinois legislature may promulgate certain classifications which will derogate from one class and be beneficial to another. This classification process is not *per se* unconstitutional. It is only unconstitutional when the classification effects an invidious discrimination to one party.

There may be a reason for exempting one party from a tax and subjecting another class to taxation. The reasons adduced may be that one class is better able to bear the onus of taxation than another class. The classification will stand if it does not infringe on due process and equal protection and the classification is adapted to secure the purposes which the legislature intended. *Father Basil's*

Lodge v. City of Chicago, 393 Ill. 246, 65 N.E. 2d 805 (1947), *Suskin v. Nixon*, 304 F. Supp. (1969). In *Faustino v. Immunization and Naturalization Service*, 302 F. Supp. 212, the U. S. District Court declared:

"Where the statutory classification is patently established to accomplish a known purpose, which purpose is properly within plenary power of the legislature, attack upon that classification must fail as not presenting a substantial constitutional question, unless classification can be shown to constitute 'invidious discrimination' or to be 'patently arbitrary' or 'utterly lacking in rational justification'." (302 F. Supp. at 215).

IV.

THE COURT BELOW ERRED IN HOLDING THAT TO DISTINGUISH BETWEEN INDIVIDUALS AND CORPORATIONS WAS AN INVIDIOUS AND UNREASONABLE DISCRIMINATION

This defendant urges this Court to carefully consider the judgments of Judge Dahl in the *Lake Shore Auto Parts* case (Appendix B), of Judge Donovan in the *Shapiro* case (Appendix C) and the dissenting opinion of Justice Davis in the three consolidated cases (Appendix A). Defendant submits that the dissent is compatible and in accord with the opinion of the Attorney General of the State of Illinois submitted to this defendant under date of January 22, 1971 (Appendix D). To attempt to add to or in any way embellish upon the reasoning and logic contained in Justice Davis' dissent would be akin to carrying coals to Newcastle.

The Supreme Court of the State of Illinois has repeatedly held that it would, if reasonably possible, so construe a statute attacked on constitutional grounds as to

promote its essential purposes and render it constitutional, in preference to a construction which would invalidate it or raise doubts as to its validity.

Baro v. Murphy, 32 Ill. 2d 453, 462, 207 N.E. 2d 593 (1965); *Time, Inc. v. Hulman*, 31 Ill. 2d 344, 353, 201 N.E. 2d 374 (1964); *People ex rel. Moss v. Pate*, 30 Ill. 2d 271, 274, 195 N.E. 2d 641 (1964); *People v. Nastasio*, 19 Ill. 2d 524, 529, 168 N.E. 2d 728 (1960); *People v. Ill. Toll Highway Comm.*, 3 Ill. 2d 218, 233-234, 120 N.E. 2d 35 (1954); *People v. Dale*, 406 Ill. 238, 247, 92 N.E. 2d 761 (1950).

The rules of constitutional and statutory construction are essentially the same. [*People v. Hutchinson*, 172 Ill. 486, 497, 50 N.E. 599 (1898); *American Aberdeen-Angus Breeders' Assn. v. Fullerton*, 325 Ill. 323, 328, 156 N.E. 314 (1927)]. As stated by the Court in *Wolfson v. Avery*, 6 Ill. 2d 78, 94, 126 N.E. 2d 701 (1955):

"If there is any distinction between the rules governing the construction of constitutions and the rules that apply to statutes, less technical ones are applied in construing constitutions. (*People ex rel. Rogerson v. Crawley*, 274 Ill. 139, 142). A constitutional guaranty should be interpreted in a broad and liberal spirit. Courts should not apply so strict a construction as to exclude its real object and intent."

The Illinois Supreme Court has established the following propositions: (a) that the Illinois Constitution is to be liberally construed; (b) that the meaning of constitutional language is best ascertained by considering the purposes of a disputed provision; (c) that such a provision should be construed to give effect to the spirit in which it was adopted; (d) that narrow, technical reasoning should not be applied; and (e) that which is within the intention is within the statute, though not within

the letter, and though within the letter, it is nevertheless not within the statute if not likewise within the intention. *Wolfson v. Avery*, *supra*, at 93-94 (1955); *People ex rel. Rogerson v. Crawley*, 274 Ill. 139, 142-143, 113 N.E. 119 (1916); *People v. Vickroy*, 266 Ill. 384, 390, 107 N.E. 638 (1915); *People ex rel. Gaines v. Garner*, 47 Ill. 246, 253 (1968); *People ex rel. Stickney v. Marshall*, 6 Ill. 672, 682, 689 (1844).

In construing a constitutional amendment, the Illinois Supreme Court reads it as a whole and attributes "to each part a meaning that is consistent and harmonious with the amendment's overall intendment and purpose" * * * to avoid whenever possible "irrational, absurd or unjust consequences." *People ex rel. Giannis v. Carpenter*, 30 Ill. 2d 24, 28, 29, 195 N.E. 2d 665 (1964).

Since the language to be construed is a constitutional provision, the object of inquiry is the understanding of the voters who adopted the instrument. [*Wolfson v. Avery*, *supra*, at 88; *City of Beardstown v. City of Virginia*, 76 Ill. 34, 41 (1875), mod. on reh. 81 Ill. 541 (1876).] It is the people's intent which must be determined.

The Court below was not required to seek the voters' subjective intentions but it may rule upon extrinsic evidence of intent. A court may look for a determination of proper construction to prior and contemporaneous acts, reasons for the provision in question, mischiefs intended to be remedied, the purposes intended to be accomplished, and the like. *Hamilton v. Rathbone*, 175 U.S. 414, 419, 20 S. Ct. 155 (1899).

"In this connection it is appropriate to consider the historial background for the inclusion of . . . (the constitutional provision) and the debates of the members of the convention, as well as explanations of

the provision published at the time." *Wolfson v. Avery, supra*, at 88.

Petitioner contends that a constitutionally permissive interpretation of Article IX-A clearly emerges from a consideration of the interpretative aids sanctioned by the Illinois Supreme Court; particularly that Article IX-A does not violate the equal protection clause of the Fourteenth amendment to the Federal Constitution.

This defendant is somewhat bewildered by the majority decision of the Illinois Supreme Court in the instant case. While they reversed the opinion of Judge Dahl in the *Lake Shore* case, wherein he threw out the entire personal property tax, they seemingly agreed with his rationale when they reinstated the tax upon both individuals and corporations. The Court appears to have been unmindful of the fact that in *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E. 2d 633, they, themselves, had found a valid distinction between corporations and individuals on which to base a discrimination. The reimposition by the Illinois Supreme Court of personal property taxes on individuals appears to have been a "gut reaction" to the financial disaster that would have resulted from the affirmance of Judge Dahl's decision.

It is a matter of public record that real estate and personal property taxes are the basis of the funding of the Illinois Public School system. It is estimated that to have upheld Judge Dahl's decision, the loss of revenue to the local units of government in the State of Illinois would have been approximately \$300,000,000. It is a matter of public record that with all the revenue available, the public school system in the State of Illinois is teetering on the brink of financial disaster. This defendant submits that the financial disaster that may well have ensued

from an affirmance of Judge Dahl's decision was not sufficient reason for the Illinois Supreme Court to hold that to draw a distinction for purposes of taxation between individuals and corporations results in an invidious and unreasonable discrimination and to then go on and reimpose personal property taxes on individuals and corporations.

As Justice Davis stated in his dissent:

"The Supreme Court in *Lawrence* (*Lawrence v. State Tax Commission of Miss.*, 286 U.S. 276, 284, 285; 52 S. Ct. 556, 559; 79 L. Ed. 1102, 1108) also stated that there is no constitutional requirement that a system of taxation should be uniform as applied to individuals and corporations, regardless of the circumstances in which it operates, (286 U.S. 276, 283, 52 S. Ct. 556, 558, 76 L. Ed. 1107), and we have just recently held that for the purpose of income taxation, corporations may be placed in one class and individuals in another and each taxed differently. (*Thorpe v. Mahin*, 43 Ill. 2d 36.) The language of the court at pages 45 and 46 is worthy of repetition:

'It is next contended that the Act violates the uniformity provision of section 1 of article IX of our constitution and the equal-protection and due-process requirements of the fourteenth amendment to the United States constitution by creating multiple classes and discriminating unreasonably among them. This contention is advanced specifically against the provisions which tax corporations at a 4% rate and individuals, trusts, and estates at 2½% rate.

'Both the equal-protection argument and the uniformity argument depend on the reasonableness of putting corporations in one class and individuals, trusts, and estates in another class for purposes of this tax. (See *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289). When the due-process contention has been

advanced, this court, citing Supreme Court cases, has stated: 'It has long been settled that the power of the legislature to make classifications, particularly in the field of taxation, is very broad, and that the fourteenth amendment imposes no "iron rule" of equal taxation. (Citations.) The reasons justifying the classification, moreover, need not appear on the face of the statute, and the classification must be upheld if any state of facts reasonably can be conceived that would sustain it. (Citations.) The burden therefore rests on one who assails the statute to negate the existence of such facts. (Citations.)' *Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 489-490.

'When the uniformity contention has been advanced this court has stated: 'It is well established that the legislature has broad powers to establish reasonable classifications in defining subjects of taxation. * * * Such classification must, however, be based on real and substantial differences between persons taxed and those not taxed. (Citations.)' (*Klein v. Hulman*, 34 Ill. 2d 343, 346-347.) 'In order to prevail on an allegation that a statute or portion of a statute is unconstitutional, the plaintiff has the burden of showing how the legislature has violated the constitution.' *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289, 291.'

'In short, petitioners have the burden of showing that the challenged classification is unreasonable. Their only assertion is that 'corporations are at a disadvantage when they compete in the same type of business with individual proprietorships or partnerships because of the rate differential.' This assertion has been rejected by the Supreme Court as to a Federal tax (*Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed. 389), and as to a State tax (*Fort Smith Lumber Co. v. Arkansas ex rel. Arbuckle*, 251 U.S. 532, 40 S. Ct. 304, 64 L. Ed. 396), and by this court (*People v. Franklin Na-*

tional Insurance Co. of New York, 343 Ill. 336; *Michigan Millers Mutual Fire Insurance Co. v. McDonough*, 358 Ill. 575), where, for purposes of the tax in question, corporations were placed in one class and individuals in another and each were taxed differently.'

"The majority, however, holds that as to a property tax the classification for exemption or taxation may not be based upon the character of the ownership, but only upon the nature of the property itself. Thus, the majority is of the opinion that the classification may not be based upon the corporation—individual distinctions which we upheld in *Thorpe*." (App. A 18-20)

In view of the fact that at the November 3, 1970 general election the voters of this State adopted Article IX-A as an amendment to the Constitution of the State of Illinois of 1870 by an overwhelming majority, defendant wonders how many of the Illinois Supreme Court Justices themselves voted "Yes" in November of 1970 and "No" the following July.

The Illinois Supreme Court is on record as having adopted the position that, without regard to the inequity of the Illinois taxing laws and the impossibility of imposing them fairly, it will not sit up and make a legal decision based on the law, but will make an outright pronouncement that they will shirk their responsibility of resolving the problems brought to them by judicial solution. This lack of backbone appears evident from the decision in *Peo. ex rel. Hamer v. Jones*, 39 Ill. 2d 360, 372; 235 N.E. 2d 589 (1968) wherein the Court took this curious position:

"Despite this holding, however, we feel compelled to disclose our awareness of the fact that problems of property tax are a constant source of legislation and

where they have been insurmountable the method has been supplemented or abandoned. While it has been pointed out that the complaint here is insufficient, it is a matter of common knowledge, that the property tax, as administered, has lost considerable face. It is far from a perfect, or even satisfactory, solution to the problem of providing revenue on an equitable basis. The property tax method was devised long before the present day complexities of urban living and the increased demands made upon government. The intricacies of the problem do not readily lend themselves to judicial solution.

"In this latter regard, we stated in *Hall v. Gillins*, 13 Ill. 2d 26, at page 32, 147 N.E. 2d 352, at page 355: 'The point of greatest concern has been the subject of frequent legislative attention. Further legislative action appears likely, and the likelihood of legislative action has always militated against judicial change.' But, while we may defer to legislative action for a time, we cannot abdicate our responsibilities even though *our approach must necessarily be a negative one* and chaos may ensue." 39 Ill. 2d 360 at 372. (Emphasis added).

This defendant can only speculate as to who gave the majority of the Illinois Supreme Court the shot of adrenalin in the instant case to make them take the bit in their mouths and run with it. Unfortunately, they ran in the wrong direction.

As this defendant has suggested, the basic reasoning and rationale adopted by the Supreme Court in the majority decision is substantially indistinguishable from the rationale relied upon by Judge Dahl in the *Lake Shore* case. The only substantial difference in the two decisions is the result reached. Both hold that to impose the burden of *ad valorem* personal property taxes on property owned by "A," and remove it from property owned by

"B" is unconstitutional. Neither court recognized that the Supreme Court in *Thorpe v. Mahin, supra*, had reasoned that sufficient differences inhered in corporations as opposed to individuals to justify different income tax rates.

To this point this defendant has concentrated on the infirmities inherent in the decision of Judge Dahl and the decision of a majority of the Illinois Supreme Court, and has not pointed out the reasonableness of the decision of Judge Donovan in the third of the consolidated cases (Appendix A33-40).

Concededly, Judge Donovan found there was a discrimination between individuals and the personal property that they used solely for their personal enjoyment and that of their families, and that of all other personal property whether owned by individuals or corporations, for the purpose of engaging in business and acquiring profits.

As a reasonable man, Judge Donovan found *that* to be a reasonable discrimination. Only unreasonable discriminations, those that are invidious, are unconstitutional. *Metropolis Theatre Co. v. Chicago*, 246 Ill. 20, aff'd. 228 U.S. 61 (1913); *Doolin v. Korshak*, 39 Ill. 2d 521; 236 N.E. 2d 897 (1968).

This defendant respectfully submits that either the dissenting opinion of Justice Davis was correct, or that the decision of Judge Donovan in the *Shapiro* case was correct.

CONCLUSION

It is incumbent upon this Court to grant the petition prayed for and to reverse the decision of the majority of the Illinois Supreme Court, a decision that may well breed a taxpayers' revolt of catastrophic proportions that conceivably could bring the State of Illinois to disaster. Defendant submits that this Court should take judicial notice that because of the burgeoning rate of the cost of local government, as well as the cost of federal government, that this Union may not celebrate its bicentennial.

For the reasons stated above, this defendant respectfully and emotionally prays that this Court grant the writ herein prayed for.

Respectfully submitted,

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APPENDIX "A"

LAKE SHORE AUTO PARTS CO.,
an Illinois Corporation, et al.,
Appellees,

v.

BERNARD J. KORZEN, County
Treasurer and ex officio County Col-
lector of Cook County, et al.
Appellants.

EUGENE L. MAYNARD, et al.,
Plaintiffs,

v.

EDWARD J. BARRETT, County
Clerk of Cook County, et al.,
Defendants.

CLEMENS K. SHAPIRO, et al.,
Appellants,

v.

EDWARD J. BARRETT, County
Clerk of Cook County, et al.,
Appellees.

Nos. 44199, 44308,
44432 Cons.

Mr. JUSTICE SCHAEFER delivered the opinion of the court.

These consolidated cases present issues concerning the construction and the validity of Article IX-A which was added to the Constitution of 1870 by referendum vote at the November 1970 election. On June 30, 1969, the Senate and the House of Representatives concurred in the adoption of Senate Joint Resolution No. 30, which provided for the submission of the proposed amendment to

a referendum vote. Senate Joint Resolution No. 30 (Senate Journal, June 30, 1969, p. 3476) is as follows:

SENATE JOINT RESOLUTION NO. 30

Resolved, By the Senate of the Seventy-sixth General Assembly of the State of Illinois, the House of Representatives concurring herein, that there shall be submitted to the electors of the State for adoption or rejection at the next election of members of the General Assembly of the State of Illinois, in the manner provided by law, a proposition to add Article IX-A to the Constitution, the added Article to read as follows:

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971.

The explanation of the amendment which appeared upon the referendum ballot is as follows:

“The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions in Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations.”

Subsequently, on May 19, 1970, the Senate adopted Senate Joint Resolution No. 67 (Senate Journal May 19, 1970,

p. 6) which contained a further statement of the intention of the General Assembly in adopting Senate Joint Resolution No. 30. Senate Joint Resolution No. 67 was concurred in by the House of Representatives on May 29, 1970 (Senate Journal May 29, 1970, p. 149). It reads as follows:

Senate Joint Resolution No. 67

RESOLVED, BY THE SENATE OF THE SEVENTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that, in adopting Senate Joint Resolution No. 30, which submits to the electors of this State a constitutional amendment prohibiting the taxation of personal property by valuation as to individuals, it was the intention of this General Assembly to abolish the ad valorem taxation of personal property owned by a natural person or by two or more natural persons, and that, by the use of the phrase "as to individuals", this General Assembly intended to mean a natural person, or two or more natural persons as joint tenants or tenants in common.

The first of the three consolidated actions that are before us was filed by Lake Shore Auto Parts Co., a corporation, on December 9, 1970. The complaint named as defendants the county clerk of Cook County, the county assessor, the county collector and the members of the board of appeals of that county, as well as the director of the Department of Local Government Affairs of the State. It alleged that it was filed as a class action on behalf of the plaintiff (hereafter Lake Shore) and on behalf of all other corporations and other "non-individuals" subject to personal property tax. It asserted that the new Article IX-A violates the fourteenth amendment to the Constitution of the United States because its effect "is to

exonerate from ad valorem personal property taxation, on and after January 1, 1971, all personal property owned by 'individuals', while authorizing and requiring the continued ad valorem taxation of all personal property owned by entities other than 'individuals.' " It also alleged that the provisions of Article IX-A immediately became a part of and amended the Revenue Act of 1939, so that that statute "imposes ad valorem taxes only with respect to personal property owned by corporations and other entities which are not 'individuals' within the meaning of said Article IX-A." The complaint prayed for a decree "finding and declaring that the provisions of the Revenue Act of 1939 * * *, as amended by Article IX-A of the Constitution of Illinois, are unconstitutional, invalid and unenforceable insofar and to the extent that such statute purports to impose ad valorem taxes with respect to personal property owned by plaintiff and all corporations and other 'non-individuals' who are members of the class which plaintiff represents." An injunction, as well as relief appropriate to a class action, was also sought.

The answers of the defendants denied the legal conclusions asserted by the plaintiff. They did not admit the allegations that related to the representative character of the action, but they did not dispute any allegations of fact that related to the basic issues.

All parties moved for summary judgment, and the trial court entered an order on March 30, 1971, granting the basic relief prayed for in the complaint, but reserving jurisdiction to determine the class aspect of the action. The order also found that Article IX-A is not applicable to personal property taxes, the assessment of which was commenced prior to January 1, 1971. The defendant, Robert J. Lehnhausen, Director of the Department of Local

Government Affairs of the State of Illinois, has appealed, and the plaintiff has cross appealed from that portion of the order that related to the particular taxes to which the court's order was applicable.

A petition seeking leave to file an original action in this court was filed on May 10, 1971 on behalf of Eugene L. Maynard, "a natural person, citizen and taxpayer of the State of Illinois," and also on behalf of one high school district and three grade school districts. Leave to file was granted on May 12, 1971. The defendants are those state and county officers who are defendants in the Lake Shore case. The complaint, which sought a declaratory judgment and other relief, alleges the adoption of Article IX-A. It is suggested that "the *Lake Shore* case will come to the Court in a flawed condition in that it will not properly present the parties and arguments essential for a full determination of the important revenue question. * * * Without the presence of Eugene L. Maynard, neither the presence nor the position of a natural person will be adequately presented to this Court." The complaint alleged that it was filed by Maynard, who is alleged to own non-business personal property, on behalf of himself and all others similarly situated. It also alleged that it was filed on behalf of the named public bodies for themselves and all other public bodies which receive proceeds from personal property taxation.

The deficiencies in parties and in legal arguments in the Lake Shore case is said to lie in the fact that the only plaintiff in that case is a corporation, and in the fact that the complaint in that case does not contain a direct request for a declaration of the unconstitutionality of Article IX-A. "The pleadings of that case place into question only certain sections of the Illinois Revenue Act. The

attack is made upon these sections as affected by the passage of Article IX-A rather than upon the constitutionality of the Article itself. * * * If the Court considers the *Lake Shore* case without additional parties and arguments, it may be foreclosed from ruling on the central issue of constitutionality of the Amendment."

No new facts were alleged in the Maynard case, and the defendant Lehnhausen has conceded the factual questions and filed a brief to stand as its answer in this case. The brief on behalf of the defendant county officers appears similarly to have been intended to stand as a motion to dismiss the complaint.

Another action was instituted by a complaint for declaratory judgment which was filed in the circuit court of Cook County on May 8, 1971, on behalf of several plaintiffs. Clemens K. Shapiro alleged that he is a natural person who owns personal property in his own name and real property jointly with his wife, none of which property is owned or used for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family. Jerome Herman alleged that he is a natural person and operates and conducts a business as a sole proprietor. Guy S. Ross and Eugene D. Ross allege that they are natural persons and operate, as a partnership, a business which owns property. M. Weil and Sons, Inc., a corporation, alleges that it is the owner of property situated in Cook County.

The complaint alleges that each of the plaintiffs is acting in a representative capacity on behalf of all others similarly situated. The defendants are those state and county officers who were named in the *Lake Shore* complaint. The complaint alleges the adoption of Article IX-A and asserts various interpretations of that Article, some of which are

advanced by all of the plaintiffs and others by one or another of the plaintiffs. To this complaint the defendant Lenhausen, Director of the Department of Local Government Affairs, filed a motion to dismiss on May 9, 1971. He also filed a "Petition for Instructions" which recited that the Lake Shore and Maynard cases were pending in the Supreme Court of Illinois, asserted that the issues in all of the three cases were substantially the same, and that it "would appear to be a duplication of effort for this Court to consider the issues involved in the case at bar [the Shapiro case] while at the same time the Illinois Supreme Court has essentially the same issues before it for consideration." The petition for instructions suggested that the Shapiro case be held in abeyance for the determination of the cases already pending before the Supreme Court. No order was entered with respect to this petition. On May 19, 1971, a motion to strike was filed in behalf of the defendant county officers. On May 28, 1971, an order was entered, by a judge other than the judge who heard the Lake Shore case, finding that the action was properly maintained as a class action and that each plaintiff had standing to bring the action in its own behalf and was a proper representative of the class he purported to represent. The order found that Article IX-A "is free of the ambiguity and uncertainty of intent charged by the plaintiffs, and that its intent is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families." Except as to the plaintiff Clemens K. Shapiro and members of his class, the complaint was dismissed. All of the plaintiffs in the Shapiro case have appealed from this judgment.

The plaintiffs in the Maynard and Shapiro cases justify the institution of their actions upon the ground that there are deficiencies as to parties and as to legal propositions in the Lake Shore case which might, without the assistance which they volunteer to supply, preclude the possibility of full consideration of the issues by this court. That it is not necessary that each person or group of persons favorably or unfavorably affected by a legislative classification be made parties to an action challenging the validity of that classification is apparent. Major cases involving discrimination of the sort here alleged have not required the presence, as parties, either in person or by representative, of all those affected. See, *e.g.*, *Lawrence v. State Tax Com. of Miss.* (1932), 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102.

There are no factual issues in the present cases, and the order of this court which consolidated the Lake Shore and Maynard cases provided: "Counsel may brief and argue all issues as to the validity and effect of the constitutional amendment known as Article IX-A of the Constitution of 1870." (See *Hux v. Raben* (1967), 38 Ill. 2d 223.) Additional class actions were not necessary to place before the court all pertinent legal theories. We shall, however, consider the arguments advanced by counsel in those cases.

Neither the plaintiffs in the Maynard case nor those in the Shapiro case are content with the interpretation of Article IX-A arrived at by Judge Walter P. Dahl in the Lake Shore case. That interpretation was that the new Article "purports to prohibit the taxation of personal property by valuation as to 'individuals', and only as to 'individuals', while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois . . . which imposed such personal property taxes as to

property owned by corporations and other 'non-individuals.' "

One alternative construction, advanced by the plaintiffs in the Shapiro case, is that the "Illinois' Constitution of 1870, as amended by the addition of Article IX-A, specifically prohibits, and declares to be unconstitutional the imposition in Illinois of the property taxes imposed by Article IX, Section 1, on all forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner." This construction is achieved by disregarding the fact that Article IX-A is clearly concerned only with the taxation of personal property, and by concentrating upon the fact that the last sentence in the official explanation which appeared upon the ballot at the election on November 3, 1970, when Article IX-A was approved, mentioned taxes upon both real and personal property. That explanation was as follows:

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

The last sentence of the explanation, however, is not a part of the amendment, and its reference to real property taxes was made in describing the existing provisions of Article IX, Section 1, which are modified by Article IX-A.

Based upon the circumstance that the phrase "as to individuals" is printed in italics in Article IX-A, the May-

nard plaintiffs turn to materials other than the legislative explanations in a search for a technical meaning. They say: "The unusual circumstance that the words 'as to individuals' are italicized in the constitutional amendment, an unprecedented practice in constitutional drafting, strongly suggests that the General Assembly, in drafting Senate Joint Resolution No. 30 used the word 'individuals' as one having established technical significance and usage in the classification of taxpayers upon whom personal property taxes have been imposed."

They purport to find the technical meaning that they seek in the circumstance that two different forms, administratively prescribed, have been used for personal property tax returns. One form is to be used by "individuals, partnerships, and unincorporated associations owning or controlling personal property used in agriculture, and all individuals owning or controlling any personal property which is not owned or used in connection with any business (other than agriculture) * * *." The other form is to be used by "[p]roprietorships, partnerships and unincorporated associates engaged in business (other than agriculture) * * *." On the assumption that the word "individuals" was intended to have an established technical meaning because it was printed in italics, the Maynard plaintiffs, and the Shapiro plaintiffs as well, argue that the word "individuals" was used to denote a class of natural persons owning personal property not used in business.

There is, however, a more prosaic explanation for the fact that the words "as to individuals" are printed in italics. When Senate Joint Resolution No. 30 was originally introduced on April 29, 1969, the proposed Article IX-A read as follows: "Notwithstanding any other provision of

this Constitution, the taxation of personal property by valuation is prohibited." (Senate Journal, April 29, 1969, p. 1038.) On May 15, 1969, Senate Joint Resolution No. 30 was amended "by striking the period and adding the following: 'as to individuals.'" Senate Journal, May 15, 1969, pp. 1407-8.

The added words were placed in *italics* in accordance with routine legislative practice, which contemplates that in the case of amendments, new material is to be italicized. The rules of the Senate of the 76th General Assembly provided: "All resolutions originated in the Senate proposing amendments to the Constitution shall be ordered printed and shall be printed in the same manner in which bills are printed." (Senate Journal, Feb. 18, 1969, p. 163.) And as to bills, they provided: "Senate Bills and House Bills in the Senate shall be printed with new matter in *italics* and omitted or superseded matter enclosed in brackets and underlined." Senate Journal, Feb. 18, 1969, p. 161.

There is thus no underpinning for the argument that the General Assembly intended that the word "*individuals*" should be given an artificial meaning. The official explanations, which are not discussed in the Maynard brief, definitely negative such an intention. We have examined the other materials to which the Maynard and Shapiro plaintiffs have referred, but have found nothing which persuades us that the words of Article IX-A should be given anything other than their natural meaning.

We conclude that the meaning of Article IX-A is that ad valorem taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited.

The Maynard case plaintiffs and all of the Shapiro case plaintiffs, with the exception of Shapiro, contend that Ar-

ticle IX-A, so construed, violates the equal protection clause of the fourteenth amendment to the constitution of the United States. Lake Shore contends that it is the Revenue Act, which must be regarded as amended by Article IX-A, rather than the Article itself, which violates the equal protection clause. We shall first consider the basic question of the validity of the discrimination effected by Article IX-A.

The new Article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed. Of course, the equal protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the states in drawing the lines between classes. Nevertheless, a state may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated.

The Supreme Court of the United States has thus described the governing principles:

"Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. *Bell's Gap. R. Co. v. Pennsylvania*, 134 U.S. 232, 237;

Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293; * * * *State Board of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co. v. Conway*, supra, 281 U.S., at 159.

"But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of legislation.' *Royster Guano Co. v. Virginia*, 253 U.S. 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 37; *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160 * * *."

Allied Stores of Ohio, Inc. v. Bowers, (1959), 358 U.S. 522, 526-27, 79 S. Ct. 437, 3 L. Ed. 2d 480, 484-85.

When classifications are reasonable, it is because of differences in the nature of the property or in the use to which it is put. The nature of the tax is important, too, for what may be a reasonable classification for a license, or for a privilege tax, is not necessarily a reasonable classification for a property tax.

Mr. Justice Brandeis stated the criterion this way in his dissenting opinion in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406, 48 S. Ct. 553, 72 L. 7d. 927, 932: "In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civ-

ilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible."

Article IX-A must be read against the scheme of property taxation established pursuant to Article IX of the Constitution of 1870, which, with respect to property taxes contemplates the levy of "a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." (Constitution of 1870, Article IX, Sec. 1.) Taxes levied by municipal corporations are required to be "uniform in respect to persons and property, within the jurisdiction of the body imposing the same." (Constitution of 1870, Article IX, Sec. 9.) The permissible exemptions from taxation are thus described: "The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. * * *" Constitution of 1870, Article IX, Sec. 3.

Against this background the incongruity of the prohibition contained in Article IX-A is apparent. It cannot rationally be said that the prohibition promotes any policy

other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others. For the purpose of a tax by valuation upon the ownership of real or personal property, the identity of the owner is a neutral consideration, as is his status as sole proprietor, joint tenant, tenant in common, partner (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 25), limited partnership (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 61), member of a professional service corporation (Ill. Rev. Stat. 1969, ch. 32, par. 415-1 *et seq.*), or of a professional association (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 101 *et seq.*; see Sup. Ct. Rule 721; 43 Ill. 2d, Rule 721).

We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the fourteenth amendment. Apart from that discrimination, the validity of the Revenue Act is not challenged, and we hold that it is Article IX-A which must fall. The validity of Article IX of the Constitution and of the Revenue Act are therefore not affected.

The judgment of the circuit court of Cook County in No. 44199 (Lake Shore) is reversed, and the cause is remanded to that court with directions to dismiss the complaint. Insofar as the judgment of the circuit court in No. 44432 (Shapiro) dismissed the complaint as to all of the plaintiffs other than Clemens K. Shapiro, it is affirmed; insofar as that judgment sustained the complaint as to Clemens K. Shapiro, it is reversed and the cause is remanded to that court with directions to dismiss the complaint. In No. 44308 (Maynard), the complaint is dismissed.

No. 44199. *Reversed and remanded with directions.*

No. 44432. *Affirmed in part; reversed in part, and remanded with directions.*

No. 44308. *Complaint dismissed.*

(Lake Shore Auto Parts Co. v. Korzen, Nos. 44199, 44308, 44432)

MR. JUSTICE DAVIS, dissenting:

The majority opinion holds that our State Constitution of 1870, as modified by Article IX-A, may not validly classify exemptions from ad valorem personal property taxation on the basis of the ownership of the property, and that such exemption may be made only upon a classification based upon the nature of the property or its use. I dissent from this pronouncement.

It is clear that the United States Constitution imposes no particular modes of taxation upon the states and leaves them unrestricted in their power to tax those domiciled within their borders so long as the tax imposed is upon property within the state, or on privileges enjoyed there, and so long as the tax is not so palpably arbitrary or unreasonable as to infringe upon the equal protection and due process requirements of the fourteenth amendment. *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 284, 52 S. Ct. 556, 559, 76 L. ed. 1102, 1105.

The majority opinion recognizes that "the equal protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the states in drawing the line between classes"; and that, "nevertheless, a state may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated." This general rule is found in the quotation from *Allied Stores of Ohio v. Bow-*

ers, 358 U.S. 522, 79 S. Ct. 437, 3 L. ed. 2d 490, cited by the majority. The rule has been expressed and exemplified many times in varying terms. Examples are: "Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action." (*Welch v. Henry*, 305 U.S. 134, 144, 59 S. Ct. 121, 124, 83 L. ed. 87, 92); "It is a salutary principle of judicial decision, * * * that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." (*Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584, 55 S. Ct. 538, 540 79 L. ed. 1071, 1073.) Due process imposes no rigid rule of equality in taxation, and irregularities resulting from singling out one particular class for taxation or exemption infringe no constitutional requirement. (*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S. Ct. 868, 872, 81 L. ed. 1245, 1253); It is only the invidious discrimination or classification which is patently arbitrary and utterly lacking in rational justification which is barred by the due process or equal protection clauses. *Flemming v. Nestor*, 363 U.S. 603, 611, 612, 80 S. Ct. 1367,—4 L. ed. 2d 1435, 1445.

The variety of ways of expressing the rule that a legislative classification for taxation purposes is not violative of the fourteenth amendment if it has a reasonable relation to the subject of the particular legislation so that all

persons similarly situated are treated alike, and pertinent citations, are found in 16A C.J.S. Constitutional Law, Sections 520, 521, 649.

In this litigation, as is often the case, the particular expression of the rule which the majority of the court chooses to rely upon may be dictated by the outcome which the judges of the majority think to be proper. Beyond doubt, the fourteenth amendment does not impose on the states an inflexible and technical rule of equal taxation, and the extent to which the states may go in devising a legislative classification for taxation is illustrated by the statement of the Supreme Court in *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 284, 285, 52 S. Ct. 556, 559, 76 L. ed. 1102, 1108:

“The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions.”

The Supreme Court in *Lawrence* also stated that there is no constitutional requirement that a system of taxation should be uniform as applied to individuals and corporations, regardless of the circumstances in which it operates (286 U.S. 276, 283, 52 S. Ct. 556, 558, 76 L. ed. 1107), and we have just recently held that for the purpose of income taxation, corporations may be placed in one class and individuals in another and each taxed differently. (*Thorpe v. Mahin*, 43 Ill. 2d 36.) The language of the court at pages 45 and 46 is worthy of repetition:

“It is next contended that the Act violates the uniformity provision of Section 1 of Article IX of our constitution and the equal protection and due process

requirements of the fourteenth amendment to the United States constitution by creating multiple classes and discriminating unreasonably among them. This contention is advanced specifically against the provisions which tax corporations at a 4% rate and individuals, trusts, and estates at 2½% rate.

"Both the equal protection argument and the uniformity argument depend on the reasonableness of putting corporations in one class and individuals, trusts, and estates in another class for purposes of this tax. (See *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289.) When the due process contention has been advanced, this court, citing Supreme Court cases, has stated: 'It has long been settled that the power of the legislature to make classifications, particularly in the field of taxation, is very broad, and that the fourteenth amendment imposes no "iron rule" of equal taxation. (Citations.) The reasons justifying the classification, moreover, need not appear on the face of the statute, and the classification must be upheld if any state of facts reasonably can be conceived that would sustain it. (Citations.) The burden therefore rests on one who assails the statute to negate the existence of such facts. (Citations.)' *Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 489-490.

"When the uniformity contention has been advanced this court has stated: 'It is well established that the legislature has broad powers to establish reasonable classifications in defining subjects of taxation. * * * Such classification must, however, be based on real and substantial differences between persons taxed and those not taxed. (Citations.)' (*Klein v. Hulman*, 34 Ill. 2d 343, 346-347.) 'In order to prevail on an allegation that a statute or portion of a statute is unconstitutional, the plaintiff has the burden of showing how the legislature has violated the constitution.' *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289, 291.

"In short, petitioners have the burden of showing that the challenged classification is unreasonable. Their

only assertion is that 'corporations are at a disadvantage when they compete in the same type of business with individual proprietorships or partnerships because of the rate differential.' This assertion has been rejected by the Supreme Court as to a Federal tax (*Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed. 389), and as to a State tax (*Fort Smith Lumber Co. v. Arkansas ex rel. Arbuckle*, 251 U.S. 532, 40 S. Ct. 304, 64 L. Ed. 396), and by this court (*People v. Franklin National Insurance Co. of New York*, 343 Ill. 336; *Michigan Millers Mutual Fire Insurance Co. v. McDonough*, 358 Ill. 575), where, for purposes of the tax in question, corporations were placed in one class and individuals in another and each were taxed differently."

The majority, however, holds that as to a property tax the classification for exemption or taxation may not be based upon the character of the ownership, but only upon the nature of the property itself. Thus, the majority is of the opinion that the classification may not be based upon the corporation — individual distinctions which we upheld in *Thorpe*.

In *Thorpe* this court reversed its prior holding that income is property (*Bachrach v. Nelson*, 349 Ill. 579), and held that an income tax was not a property tax. The significance of this determination was that Section 1 of Article IX of our Constitution of 1870 required the levying of a tax "by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." At the same time, the constitutional provisions permitted a tax upon franchises and privileges in such manner as the legislature might direct, so long as it was uniform as to each "class." Obviously, the legislature could not, under the foregoing provisions, impose

an income tax upon corporations at one rate and upon individuals at a lesser rate if it were a tax on property. Our constitution then prohibited any tax on property unless structured to be uniform as to valuation.

After reaching the conclusion that an income tax was not a property tax, the court faced no barrier in upholding the Illinois Income Tax Act. In the case at bar, after Article IX-A amendment to the Constitution of 1870 was adopted, the uniformity provisions of Section 1 of Article IX were no longer effective as to the taxation of personal property of individuals, and the court should have found no impediment to upholding the validity of Article IX-A and the abolishment of this tax as to individuals.

Constitutional provisions requiring property to be taxed uniformly in proportion to its value are not uncommon to the states. In the California Railroad Tax cases (*San Mateo County v. Southern Pacific R. Co.*, 13 Fed. 722, appeal dismissed per stipulation, 116 U.S. 138; *Santa Clara County v. Southern Pacific R. Co.*, 18 Fed. 385, aff'd other grounds, 118 U.S. 394), which held that unequal taxation, based upon the character of the owner, was forbidden by the fourteenth amendment, a constitutional provision requiring uniformity of taxation was involved. Even though the California constitution specified that all property be taxed in proportion to its value, a state statute especially provided that as to railroad properties only, the amount of a mortgage on the real estate was not to be deducted in ascertaining the value of the real estate for taxation purposes. The trial court quite properly held that this method of valuation, as to railroads only, was improper under the circumstances, and the United States Supreme Court affirmed the lower court on a non-constitutional basis without reaching the constitutional question. The California

Railroad Tax cases should be read, with cognizance, that the state constitution required all property to be taxed in proportion to its value, and that the cases arose at a time when it was necessary to establish that the word, "persons" as used in the fourteenth amendment, included corporations. Apparently, the latter point had a strong bearing on the expressions found in these cases.

In the case at bar, by virtue of the adoption of Article IX-A, there is no constitutional requirement that taxes on personal property be uniform as to individuals and corporations so that each pays a tax in proportion to the value of his or its property. Article IX-A, which we are called upon to consider, eliminated this requirement; it provides that "the taxation of personal property is prohibited as to individuals." Thus, the case at bar is a far cry from one in which the legislature is attempting to discriminate between individuals and corporations in the face of a constitutional provision prohibiting such discrimination. Here the question for determination is whether, absent the requirement of a state constitution that corporate and individual personal properties be taxed the same, the equal protection clause of the fourteenth amendment permits them to be taxed differently? I believe that it does!

Without the constitutional requirement of uniformity on the taxation of properties, there is no reason or justification in the case at bar for stating that personal property taxation may not be classified on the basis of the ownership of the property. The Constitution of 1870, as amended by Article IX-A, does not so provide, and the Constitution of 1970 suggests the contrary. Article IX of the Constitution of 1970 relates to revenue, and Section 5 thereof pertains to personal property taxation. Subsection (a) thereof provides that the legislature "may clas-

sify personal property for purpose of taxation by valuation, abolish such taxes on any or all *classes* and authorize the levy of taxes in lieu of the taxation of personal property by valuation." (emphasis ours.) Without more, it could be said that the word "classes" refers only to classes of property, but subsection (c) refers to the abolition of all ad valorem personal property taxes by January 1, 1979, and the replacement of the lost revenue, and provides: "Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those *classes* relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971." (emphasis ours.) Obviously, the word "classes" as there used, does not refer to classes of property; it refers to classes of property owners, and provides for taxation according to the character of the owner. If the majority opinion is to stand and Article IX-A held to be unconstitutional, then under consistent application of its rationale, subsection (a) of Section 5 of the new constitution is likewise unconstitutional.

The majority opinion chose to rely upon the rationale of *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. ed. 927. I believe that the elucidation and logic of the dissent of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, offers the better reason. Therein, Mr. Justice Brandeis made some observations which are particularly apropos here. The court had under consideration a tax on the gross receipts of corporate taxicab companies where no similar tax was imposed upon the receipts of individuals who operated taxicabs. The majority held that the classification was based solely upon the character of the owner, and that it violated the fourteenth amendment.

In his dissenting opinion, 277 U.S. 389, 403-412, 48 S. Ct. 553, 555-558, 72 L. ed. 927,—, Mr. Justice Brandeis observed that the tax applied equally to all corporations, foreign and domestic. He stated that the fundamental question before the court was:

“Does the equality clause prevent a state from imposing a heavier burden of taxation upon corporations engaged exclusively in intrastate commerce, than upon individuals engaged under like circumstances in the same kind of business? The narrowed question presented is whether this heavier burden may be imposed by a form of tax ‘not peculiarly applicable to corporations’; that is, by a tax of such a character that it might have been extended to individuals if the Legislature had seen fit to do so.”

He then pointed out that the difference between a business carried on in corporate form and one carried on by natural persons is “a real and important one.” He observed that the discrimination was not based upon any difference in the source of income or in the character of the property employed, and stated the obvious: that the requirement that a classification must be reasonable does not imply that the policy embodied in the classification must be deemed by the court to be a wise one. He concluded that a state is permitted to impose upon corporations more than their pro rata share of the burden of taxation, and that nothing in the Federal constitution prohibits this.

It seems that this is exactly what we held in *Thorpe v. Mahin*, 43 Ill. 2d 36. We recognized what we called the obvious advantages of carrying on a business in the corporate form. The privilege of carrying on a business in this form has many advantages: the corporate ownership of property, freedom from personal liability for corporate obligations, continuity of existence, etc. There we acknowl-

edged that there are sufficient differences between the privilege of earning or receiving income as a corporate entity and that of earning or receiving income as an individual, to justify the variance in tax rates between the individual and the corporation, and here we should recognize that there are sufficient differences between the privilege of owning property as a corporate entity and the privilege of owning it as an individual to justify the exemption in the case of the individual property owner. The fact that the corporation may in some respects be placed at a disadvantage in its competition with individuals owning similar property and engaged in the same business should not condemn the classification as unreasonable. *Thorpe v. Mahin*, supra 46.

There is no more compelling reason to suggest that the classifications for personal property tax purposes must be based upon the nature of the property than there is to suggest that the classifications for income tax purposes must be based on the source or type of income to be reported. The Article IX-A constitutional amendment creates a classification based upon the distinctions inherent between corporations and individuals — a distinction which we have recognized and upheld as valid under the equal protection clause requirement of the fourteenth amendment in *Thorpe v. Mahin*.

Another matter is worthy of mention in our consideration of this case. The evils and the inequities in the administration of the personal property tax collections in this State are known to everyone. That these inequities apply with equal force to corporate taxpayers and individual taxpayers may, or may not, be totally true. The desire and purpose of systematically eliminating this archaic form of taxation are apparent from the actions of the

people and the legislature of the State. The General Assembly, which drafted and adopted Senate Joint Resolution No. 30, had previously at the same legislative session already exempted from such taxation, household furniture and one automobile, per household, used for personal pleasure. (Ill. Rev. Stat. 1969, ch. 120, par. 500.21a.) The Article IX-A amendment was overwhelmingly ratified by the people of the State. The Constitution of 1970, likewise adopted by the vote of the people, expressed their concern over the form and use of personal property taxation. The newly-adopted constitution prohibits the reinstatement of any ad valorem personal property tax abolished before July 1, 1971, the effective date of the new constitution. This provision refers to the personal property tax as to individuals which was abolished by Article IX-A, and the majority opinion runs counter to this constitutional prohibition in that it reinstates the personal property tax as to individuals. In addition, the new constitution provides that all ad valorem personal property taxes shall be abolished on or before January 1, 1979.

The obvious spirit of the Article IX-A amendment, the will of the people, as expressed by its adoption, and the intent and purpose of the legislature, should not be thwarted unless a construction to this effect is required. Thus, it is very appropriate that we consider the mischief sought to be remedied and the purpose to be accomplished by the Article IX-A amendment. (*Wolfson v. Avery*, 6 Ill. 2d 78, 88.) Likewise, the court should memorialize the salutary rule of law that an amendment to a state constitution should be deemed violative of the Federal Constitution only where the asserted constitutional rights cannot otherwise be protected and effectuated. *Reynolds v. Sims*, 377 U.S. 533, 584, 84 S. Ct. 1362, —, 12 L. ed. 2d 506, 540.

After considering the background of this constitutional amendment and the purpose which it, along with the other contemporary legislative enactments and constitutional adoptions seeks to accomplish, I believe that the classification found in the Article IX-A amendment does not constitute an invidious discrimination; that it seeks to accomplish and promote a valid policy expressive of the will of the people and the intent and purpose of the legislature; and that the distinction upon which the classification for exemption is based does not overstep the limitations imposed by the fourteenth amendment.

APPENDIX B

STATE OF ILLINOIS
COUNTY OF COOK **SS**

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

LAKE SHORE AUTO PARTS CO.,
an Illinois corporation, on its own
behalf and also as representative of a
class of corporations and other "non-
individuals", which class is herein de-
scribed,

Plaintiffs,

vs.

BERNARD J. KORZEN, County
Treasurer and ex-officio County Col-
lector of Cook County, GEORGE E.
KEANE and HARRY H. SEMROW,
Members of the Board of Appeals of
Cook County, P. J. CULLERTON,
County Assessor of Cook County,
EDWARD J. BARRETT, County
Clerk of Cook County, and ROBERT
J. LENHAUSEN, Director, Depart-
ment of Local Government Affairs of
the State of Illinois,

Defendants.

No. 70 CH 5123

ORDER

This cause coming on to be heard upon the Motion for Summary Judgment of LAKE SHORE AUTO PARTS CO., an Illinois corporation, plaintiff, by and through its attorneys, ORLIKOFF, PRINS, FLAMM & SUSMAN, and upon the Cross-motion For Summary Judgment of defendant ROBERT J. LENHAUSEN, Director, Department of Local Government Affairs of the State of Illinois, by and through the Attorney General of Illinois, and the Cross-motion For Summary Judgment of defendants KORZEN, KEANE, SEMROW, CULLERTON and BARRETT, assessing and taxing officials of Cook County, by and through the State's Attorney of Cook County,

The Court having examined the pleadings and memoranda filed by the parties hereto, having heard the arguments of counsel and being fully advised in the premises

DOES HEREBY FIND:

1. That there is no genuine issue as to any material fact in this cause, and it is therefore appropriate and proper that the cause be determined on the Motion and Cross-motions For Summary Judgment.

2. That the plaintiff, LAKE SHORE AUTO PARTS CO., is a corporation duly organized and existing under the laws of Illinois, and on April 1, 1970, was the owner of personal property having a taxable situs in the County of Cook, which property has been included on the assessment role now being prepared by the assessing officials of Cook County for the tax year 1970; that the plaintiff has standing to bring this action on its own behalf, and it is not at this time necessary or appropriate to determine whether the action is properly brought and maintained as a class action or to determine the definition of the plaintiff class.

3. That an amendment to the Illinois Constitution of 1870, designated as Article IX-A, was approved by the people of Illinois at a referendum held on November 7, 1970, and such amendment, by its terms, became effective January 1, 1971; that said Article IX-A purports to prohibit the taxation of personal property by valuation as to "individuals", and only as to "individuals", while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, §482 et seq.) which impose such personal property taxes as to property owned by corporations and other "non-individuals".

4. That said Article IX-A is self-executing, and the necessary effect of the adoption thereof is to amend the various provisions of the Revenue Act of Illinois, specifically including but not limited to § 18 thereof (Ill. Rev. Stat. 1969, ch. 120, §499), so as to exempt from personal property taxes thereby imposed all personal property owned by "individuals", while retaining such taxes as to personal property owned by corporations and other "non-individuals."

5. That the Revenue Act of Illinois, as so amended by Article IX-A of the Illinois Constitution, deprives the plaintiff corporation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States: that said Revenue Act of Illinois, to the extent that it purports to impose personal property taxes with respect to the property owned by plaintiff, is therefore unconstitutional, void and of no effect whatsoever.

6. That Article IX-A of the Illinois Constitution is not applicable with respect to personal property taxes imposed by the Revenue Act of Illinois for the year 1970, the as-

assessment date for which was April 1, 1970, and the assessment of which had been commenced prior to January 1, 1971, the effective date of Article IX-A, notwithstanding that such assessment had not been completed as of that date.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

7. The plaintiff's Motion for Summary Judgment is granted in part and denied in part, the Court declaring that the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, §§ 482 et seq.), said Revenue Act having been amended by Article IX-A of the Illinois Constitution, is violative of the Fourteenth Amendment to the Constitution of the United States and is held to be void and unenforceable insofar as said Revenue Act purports to impose personal property taxes on plaintiff.

8. The defendants' Cross-motions For Summary Judgment are granted in part and are denied in part, the Court declaring that Article IX-A of the Illinois Constitution is not applicable to, and does not impair the collection of, personal property taxes imposed by the Revenue Act of Illinois, the assessment of which were commenced prior to January 1, 1971.

9. Except for those matters adjudicated by paragraphs 7 and 8 of this Order, this Court retains jurisdiction of this cause for all purposes.

10. Pursuant to Rule 304(a) of the Rules of the Supreme Court of Illinois, the Court expressly finds that there is no just reason for delaying enforcement or appeal of this Order. In the event of an appeal from this Order, the Court is of the opinion that the interests of justice would be best served by hearing and deciding the appeal as expeditiously as possible because of the manifest pub-

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lic importance of the issues and the substantial amount of tax revenues that are involved.

DATED: March 30, 1971.

ENTER:

**JUDGE WALTER P. DAHL,
Judge, Circuit Court of Cook
County, Illinois**

APPENDIX C

STATE OF ILLINOIS SS
COUNTY OF COOK

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, TAX DIVISION

CLEMENS K. SHAPIRO, JEROME
HERMAN, d/b/a THE SPOT, GUY
S. ROSS AND EUGENE R. ROSS,
d/b/a GUY S. ROSS & CO., a part-
nership; and M. WEIL AND SONS,
INC., an Illinois Corporation, all in-
dividually and in representative ca-
pacity,

Plaintiffs,

vs.

EDWARD J. BARRETT, County
Clerk of Cook County; BERNARD
J. KORZEN, County Treasurer and
ex-officio County Collector of Cook
County; GEORGE E. KEANE and
HARRY H. SEMROW, Members of
the Board of Appeals of Cook County;
P. J. CULLERTON, County Assessor
of Cook County, and ROBERT J.
LEHNHAUSEN, Director, Depart-
ment of Local Government Affairs of
the State of Illinois,

Defendants.

No. 71 L 5745

title IX, Section 1, on *all* forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner.

All plaintiffs contend that if Article IX-A does not prohibit the taxation of all property, then Article IX-A prohibits the tax to be measured by the value of the property taxed.

All plaintiffs contend that the prohibition of Article IX-A, which abolishes the imposition of property tax measured by valuation of the property taxes, extends to those taxes so measured where the assessment of plaintiffs' property has been commenced by defendants prior to, even though not completed on January 1, 1971, the effective date of Article IX-A, and payment due thereafter.

Natural Persons contend that:

The designation "individuals" in Article IX-A properly and validly describes, is intended to apply, and does apply solely to them; and the taxation by valuation prohibited in Article IX-A, if not applicable to all property owned by them, is applicable to personal property owned by them and used by them for their personal purposes; and that,

Article IX-A prohibits taxation, by valuation of personal property as to them alone, while denying that prohibition as to all others, is proper, valid, and constitutional under both Illinois Constitution and the Constitution of the United States.

Both business entities and corporations contend that:

Article IX-A, effective January 1, 1971, as an amendment to Illinois Constitution of 1870 is offensive to the Constitution of the United States.

If the designation "individuals" in Article IX-A invokes prohibition of taxes by valuation on personal property exclusively as to "natural persons" and personal property owned by them, but denies the same prohibition to business entities and corporations, then such classification is discriminatory, unreasonable and offensive both to Illinois Constitution and the Constitution of the United States. This is true for the reasons that such classification is invalidly predicated upon purported differences between *users* of identical property and the *use* to which that property is put, instead of differences found to exist between the forms of the property upon which that tax is directly laid. The employment of such base constitutes special legislation prohibited by Article IV, Section 22 of Illinois Constitution, as well as denying to business entities and corporations due process of law and the equal protection of the law guaranteed to them by Article II, Section 2 of the Illinois Constitution, and the Fourteenth Amendment to the Constitution of the United States.

Unless the exclusion of property owned by "individuals" is construed to exclude the property of business entities and corporations, as well as that of natural persons, then the employment in Article IX-A of the term "individuals" is so vague, uncertain, and incapable of definitive application to the context of Article IX, that Article IX-A must fall because it is totally absent the comprehension required, especially of constitutional provisions, by both Illinois Constitution and the Constitution of the United States.

Business entities contend that:

(a) The designation "individuals" in Article IX-A is correctly and properly described, and is intended to apply to, and does include business entities which own property because the natural person owners of that business en-

tity are personally and individually liable for the payment of that tax.

Article IX-A prohibiting taxation by valuation of property owned by such business entities, while denying that prohibition as to corporations is proper, valid and constitutional under both Illinois' Constitution and the Constitution of the United States.

Corporations contend that:

If the designation "individuals" in Article IX-A applies to any or all owners of property except corporate owners of property, then such classification is discriminatory, unreasonable, and offensive to both the Illinois' Constitution and the Constitution of the United States.

Defendants contend that the taxation by valuation of real property and other property, as provided in Article IX shall continue and remain, in all regards, unaffected by Article IX-A; however:

Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited only as to natural persons; but as to them, only as to the personal property owned by them; but as to that personal property owned by them, only such of that property which is used by them for the personal enjoyment of themselves and their families.

This matter appearing on the pleadings aforesaid, presenting the issues to this Court as delineated by those pleadings, and the Court having heard arguments by all parties in support of their respective positions, THIS COURT FINDS:

1. That a genuine cause and controversy exists, and that this action is properly maintained under the provisions of

Chapter 110, Section 57.1 (Declaratory Judgments), Civil Practice Act, Illinois Revised Statutes, 1969.

2. Each of these plaintiffs has standing to bring this action in his or its own behalf and is a proper representative of his class.

3. That this action is properly maintained as a class action, and the members of those classes are adequately and competently represented by counsel herein.

4. That Article IX-A of the Illinois Constitution of 1870 is valid, constitutional and immune to all of the plaintiffs' assaults, both under the Illinois Constitution and the Constitution of the United States.

5. That Article IX-A is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families.

6. That these findings by this Court make it unnecessary to consider contentions made by plaintiffs in the alternative.

7. That all issues as found heretofore are found in favor of the defendants, except as to those issues relating to the plaintiff Clemens K. Shapiro and members of his class involving personal property owned and used by them for the personal enjoyment of themselves and their families.

8. That motions to strike and dismiss plaintiffs' Complaint are sustained in regards and in respect of those found in favor of the defendants, except as to those issues raised by plaintiff Clemens K. Shapiro and members of his class involving personal property owned and used by

them for the personal enjoyment of themselves and their families.

9. Pursuant to Rule 304(a) of the Rules of the Supreme Court of Illinois, the Court expressly finds that there is no just reason for delaying enforcement or appeal of this Order. In the event of an appeal from this Order, the Court is of the opinion that the interests of justice would be best served by hearing and deciding the appeal as expeditiously as possible because of the manifest public importance of the issues and the substantial amount of tax revenues that are involved.

WHEREFORE, IT IS ORDERED, ADJUDGED and DECREED that defendants' motions to strike and dismiss are sustained as to all plaintiffs, except the plaintiff Clemens K. Shapiro and members of his class, and plaintiffs' Complaint is stricken as to all issues and in all regards and respects contrary to and in variance with the judgment of this Court; that Amending Article IX-A of the Illinois Constitution is valid and constitutional in all respects and is immune to attack under any provision or provisions of the Illinois Constitution of 1870 and the United States Constitution, and that said Amending Article IX-A declares its prohibition exclusively as to any personal property tax on the personal property owned by individuals and used for their personal enjoyment and that of their families.

ENTER:

THOMAS C. DONOVAN
Presiding Judge, Tax Division,
Circuit Court of Cook County,
Illinois.

Date: May 27, 1971

APPENDIX D

January 22, 1971

FILE NO. S-260
TAXATION:
Personal Property
Tax Exemption

Honorable Robert J. Lenhausen
Director, Department of Local
Government Affairs
325 West Adams Street
Springfield, Illinois 62704

Dear Sir:

I have your recent letter wherein you state:

"The Department of Local Government Affairs is vested with certain statutory powers and duties relating to the assessment of property for property tax purposes, among which are the following:

"1. 'Assist and advise the local governments of the State in matters pertaining to — the assessment and equalization of property —'

"2. 'Direct and supervise — the assessment for taxation of all real and personal property in this State —'

"3. 'Confer with, advise and assist local assessment officers relative to the assessment of property for taxation'. (Chapter 127, Paragraph 63b14.13 and Chapter 120, Paragraph 611, I.R.S.)

"Pursuant to such statutory provisions, inquiries have been made by local assessment officers concerning the effect of the amendment to the Illinois Constitution, approved by referendum on November 3, 1970, prohibiting, as to individuals, the taxation of personal property by valuation.

"We would appreciate receiving your opinion as to the following:

"1. Is an individual proprietor to be exempt from taxation on his business inventory and other personal property used in such business?

"2. Is the individual farmer exempt from taxation on farm equipment and personal property owned in his capacity as an individual farmer?

"3. Is the personal property of partnerships exempt, or will such personal property be taxable under the Revenue Act of 1939 because a partnership is considered to be an entity (even though composed of individuals) which requires treatment different from that accorded natural persons under the new Constitutional amendment?

"4. Is the personal property of a decedent's estate exempt from personal property tax if the heirs or legatees are individuals?

"5. Is the personal property of a decedent's estate exempt from personal property tax if the legatee is a corporation?

"6. Is the personal property held by an individual trustee exempt from taxation if the beneficiaries or beneficial owners are individuals? Is the answer different if the property is held by a corporate trustee?

"7. Is the personal property owned by tenants in common or joint tenants exempt from taxation?

"8. Is the personal property owned by a joint venture or other co-ownership exempt from taxation?

"Although the next assessment of personal property will be April 1, 1971, local assessing officials must soon begin to order the printing of forms for such assessment, and Supervisors of Assessment must be prepared to advise township assessors as required by Section 2 of the 'Revenue Act of 1939', (Chapter 120, Paragraph 483, I.R.S.). We would, therefore, appre-

ciate receiving your opinion at your earliest convenience."

As you have indicated in your letter, the amendment to the Illinois Constitution, approved by referendum on November 3, 1970, prohibits the taxation of personal property by valuation as to individuals. Your attention is called to Paragraph 499 of Chapter 120, 1969 Illinois Revised Statutes which states as follows:

"The property named in this section shall be assessed and taxed except so much thereof as may be, in this act, exempted:

"First: All real and personal property in this state.

"Second: All moneys, credits, bonds or stocks and other investments, the shares of stock of incorporated companies and associations, and all other personal property, including property in transitu to or from this state, used, held, owned or controlled by persons residing in this state, and all intangible personal property of foreign corporations, except those excluded by section 18 of this Act, doing business in this state which is located in this state and used in their business transacted within the state, provided that the provisions of this section relating to the taxation of intangible personal property shall not apply to those foreign corporations which are required by law to pay a premium tax for the privilege of doing business in this State.

"Third: The shares of capital stock of banks and banking companies doing business in this state.

"Fourth: The capital stock of companies and associations incorporated under the laws of this state."

It can be observed from the language of the foregoing Paragraph 499 that the personal property tax is a tax upon

the personal property itself. Paragraph 534 of Chapter 120 does, of course, set forth certain rules pertaining to the listing of personal property but these do not change the nature of the personal property tax which is a tax upon the personal property.

It therefore becomes necessary for us to determine the effect of the constitutional amendment which prohibits the taxation of personal property by valuation as to individuals. It would be unreasonable to believe that the language of the constitutional amendment could expressly include each and every conceivable situation. Necessary implications and intendments from the language used in a statute may be restored to in order to ascertain the legislative intent. See *U.S. v Jones*, 204 Fed. 2d 745 (certiorari denied 346 U. S. 854). In that case the court said at page 754:

“Necessary implication refers to a logical necessity; it means that no other interpretation is permitted by the words of the Act construed; and so has been defined as an implication which results from so strong a probability of intention that an intention contrary to that imputed cannot be supported. 42 C.J.S., page 405 and cases there cited. The term is used where the intention with regard to the subject matter may not be manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances and the general language. *Burford v. Huesby*, 35 Cal. App. 2d 643, 96 P.2d 380; *Goldfein v. Continental Ins. Co.*, 125 Neb. 112, 249 N.W. 78; 42 C.J.S., page 406. Consequently that which is implied in a statute is as much a part of it as that which is expressed, for a statutory grant of a power carries with it, by implication, everything necessary to carry out the power and make it effectual and complete.
• • •”

Furthermore, at page 100 of Volume 34 of Illinois Law and Practice is found the following statement:

"In construing a statute to give effect to the legislative intent and purpose, the court should, if possible, give it a reasonable, sensible, practical, and common-sense construction even though such construction qualifies the universality of its language."

As indicated above, the personal property tax is a tax upon the personal property itself. The only logical conclusion then as to the meaning of the constitutional amendment (Article IX-A) is that if the effect of the tax would be directly upon an individual (as distinguished, for example, from a corporation) then such personal property tax is abolished.

Article IX-A of the Illinois Constitution of 1870 became effective January 1, 1971 and is as follows:

"Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

Provision for the adoption of Article IX-A was made by Senate Joint Resolution No. 30 of the 76th General Assembly which reads as follows:

"RESOLVED, BY THE SENATE OF THE SEVENTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that there shall be submitted to the electors of the State for adoption or rejection at the next election of members of the General Assembly of the State of Illinois, in the manner provided by law, a proposition to add Article IX-A to the Constitution, the added Article to read as follows:

ARTICLE IX-A

Section. 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971."

Also pertinent is Senate Joint Resolution No. 67 which provides:

"RESOLVED, BY THE SENATE OF THE SEVENTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that, in adopting Senate Joint Resolution No. 30, which submits to the electors of this State a constitutional amendment prohibiting the taxation of personal property by valuation as to individuals, it was the intention of this General Assembly to abolish the ad valorem taxation of personal property owned by a natural person or by two or more natural persons, and that, by the use of the phrase 'as to individuals', this General Assembly intended to mean a natural person, or two or more natural persons as joint tenants or tenants in common."

Turning now to the questions which you have asked I shall discuss them in order. Your first question asks whether an individual proprietor is exempt from taxation on his business inventory and other personal property used in such business. Since the effect of such a tax would be upon an individual, I am of the opinion that the individual proprietor would be exempt. Similarly, the individual farmer is exempt in your second question.

Thirdly, you have inquired as to whether personal property of a partnership is exempt. A partnership is an asso-


ciation of two or more persons to carry on a business for profit. The effect of the taxation of partnership property would be directly upon the individual partners and consequently I am of the opinion that such property is also exempt.

In your fourth and fifth questions you inquired about the taxability of personal property in a decedent's estate. The effect of taxation of personal property in an estate would be directly upon the heirs of legatees. Consequently, if the heirs or legatees are individuals such personal property is exempt, but if the legatee is a corporation then such personal property would be subject to tax.

In your sixth question you inquired whether personal property held by an individual trustee is exempt from taxation if the beneficiaries or beneficial owners are individuals. Since the effect of the tax would be directly upon an individual beneficiary, such personal property would be exempt. The fact that the trustee is a corporation or an individual would make no difference.

Seventh, you inquired whether personal property owned by tenants in common or joint tenants as individuals is exempt. For the reasons stated above, such personal property would also be exempt. Personal property owned by individuals in a joint venture or other co-ownership would also be exempt since the effect of the tax would be upon individuals.

Very truly yours,
ATTORNEY GENERAL



APPENDIX E

Testimony of Maurice W. Scott, Executive Vice President, Taxpayers' Federation of Illinois, to Members of House Revenue Committee.

September 8, 1971

Chairman Randolph and Members of the House Revenue Committee:

Without repeating what is now history, we all know that the Illinois Supreme Court by its recent decision in the Lake Shore Auto Parts Co. v. Korzen Case, Nos. 44199, 44308 and 44432, held that the Illinois Constitution, as modified by Article IX-A which was approved last fall by the people by a ratio of more than 7 to 1, may not validly classify exemptions from ad valorem personal property taxation on the basis of the ownership of the property, and that such exemption may be made only upon a classification based upon the nature of the property or its use. In other words, the amendment which supposedly abolished the personal property tax on an ad valorem basis on individuals, and which was submitted by the General Assembly to the voters on November 3, 1970 with much success, no longer prevails. In dollar figures what does this decision mean? It means that the ad valorem personal property tax as it was on November 2, 1970, is still with us and breaks down approximately as follows relative to amounts actually collected:

(a) *Cook County* —

Personal property tax on corporations	\$126,000,000
Personal property tax on unincorporated business	13,000,000
Personal property tax on individuals	2,000,000
	<hr/>
	\$141,000,000

(b) *Downstate Counties* —

Personal property tax on corporations	\$111,000,000
Personal property tax on unincorporated business	20,000,000
Personal property tax on individuals	27,000,000
	<hr/>
	\$158,000,000

In 1969 the General Assembly passed a bill (S.B. 816) which exempted from personal property taxation household furniture used for the personal living purposes of the owner at his residence and one automobile used for personal pleasure purposes per household. This statute, Chapter 120, par. 500.21a, Illinois Revised Statutes, was not before the Court in the Lake Shore Auto Parts Co. Case and is still valid. Under its provisions, taxpayers are relieved from paying about \$6,000,000 in ad valorem personal property taxes in Cook County and approximately \$52,000,000 in downstate counties.

It is a known fact that the people in Illinois are resentful of the Lake Shore decision, and they can't understand how the Court can over-turn their overwhelming decision last fall in approving the amendment to abolish the personal property tax on individuals. As a result of their resentment, we are meeting here today. Let us examine some of the complications and remedies as I see them.

In the new State Constitution, Section 5(a) of Article IX provides that the Legislature "may classify personal

property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation." Without more, it could be argued that the word "classes" refers only to classes of property, but Section 5(c) of Article IX of the new Constitution refers to the abolition of ad valorem personal property taxes by January 1, 1979, and the replacement of the lost revenue, and provides: "Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971." It is the opinion of many, and one that I lean to, that the word "classes" as used in said Section 5(c) does not refer to classes of property, but refers to classes of property owners and provides for taxation according to the character of the owner. If the decision of the Lake Shore Auto Parts Co. Case is to stand and Article IX-A held to be unconstitutional, then under consistent reasoning, it could be argued with weight that Section 5(a) of Article IX of the new Constitution is also unconstitutional. In fact, I am doubtful of the Constitutionality of the statute which exempts household furniture and one personal automobile per household if it is tested in the Courts. But a statute is presumed valid until it is proven otherwise, so we won't go into that phase of crystal gazing today, as we already have enough problems before us.

Now, I get to the nub of my presentation. It is my opinion that if the General Assembly, this fall or next year, does anything in the area of abolishing the personal property tax on an ad valorem basis, the safest thing to do would be to abolish it on all taxpayers — both on individ-

uals and on business and make up lost revenues from both types of taxpayers. In this regard, the General Assembly would be faced with making up about \$300,000,000 in revenue.

I offer the following for consideration by members of the General Assembly in studying the problem of replacing revenues.

- (1) The new State Constitution, Article IX, Section 5(c), provides that when the General Assembly abolishes the personal property tax on an ad valorem basis, it shall replace all revenue lost by units of local governments as a result of the abolition of personal property taxes subsequent to January 2, 1971, by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying personal property because of the abolition of such taxes subsequent to January 2, 1971. Does this mean that a taxpayer who does not pay any personal property tax as of today because his household furniture and personal automobile are exempt, is not subject to any statewide replacement taxes that the General Assembly might enact?

Although not entirely free from doubt, my opinion is that he would be subject to statewide replacement taxes, because the "household furniture, personal automobile exemption" did not free him entirely from the ad valorem personal property tax. He is still subject to a personal property tax levied on the assessment of such items as animals, campers, clothes on his back, money in his pocket or in the bank, jewelry, etc.

- (2) My telephone has been deluged, and I know yours has too, since the decision in the Lake Shore Auto Parts Co. Case last July, and the tenor of the public is: "Abolish the ——— personal property tax now, immediately, and replace the lost revenues from the State Income Tax." This idea and action thereon to carry it out by the Legislature would be most popular with the public, but in the name of sense, how can it be done at this late hour when the Governor had to veto and reduce recent appropriations to balance the budget for fiscal 1972? Do you as Legislators have the fortitude to cut or abolish present programs and to reduce spending sufficiently to come up with \$300,000,000 for local governments? It is possible but not probable, and such action, if you could do it, would be "the shot heard around the world."

In all fairness, may I state that through your action in 1969, counties and municipalities share in State Income Tax receipts to the extent of 1/12 and on a per capita basis. To insure property tax relief, maybe the Legislature should require a certain percent of such revenues be used by counties and municipalities for property tax relief and not use all of such receipts as additional spending revenues. A few counties and municipalities have carried out this idea on their own initiative in 1971 and reduced corporate fund levies.

Also, it should be noted that the common schools share heavily in the State Income Tax receipts through the School Formula, and this is a result of your previous action. In fact, in school year 1968-69, State aid claims paid to the common schools

amounted to \$369.7 million, while in school year 1969-70 such State aid claims amounted to \$601.2 million, a percentage increase of approximately 63% in a period of one year.

- (3) The State Income Tax for fiscal 1972 (July 1, 1971 to July 1, 1972) is estimated to yield a total of 1.081 billion, or \$864 million from individuals and \$217 million from corporation.

Projecting this figure, I estimate that an additional State Income Tax rate of 1% on both individuals and corporations would yield about \$430 million in a 12 month period, or \$360 million from individuals and \$70 million from corporations. This takes into consideration the fact that the additional 1% rate would be free of deductions, credits, exemptions, etc.

In fact, on this basis an additional rate of 3/4 of 1% would produce approximately \$322 million in a 12 month period, enough to replace revenues equivalent to the personal property tax receipts that would be collected for the year 1971.

- (4) The State R.O.T. and Use Tax revenue estimates for fiscal 1972 are \$1.085 billion (State rate is 4%). An additional rate of 1% would yield approximately \$272 million in a 12 month period.
- (5) Realizing the problem presented in (1) above, it is my opinion that the General Assembly should consider the replacement revenue possible for local governments which could be raised from a State wheel tax. In 1969 there were 4,349,697 passenger automobiles registered in the State of Illinois and 915,980 trucks, busses and trailers. A State wheel

tax of \$10 on each such vehicle, for example, collected by the State when such vehicles are registered annually with the State, and the receipts therefrom returned to local governments, would yield at least \$52 million a year. Airplanes and boats are also registered with an agency of government in the State of Illinois, and a State wheel tax on such "vehicles" would produce additional revenue.

- (6) The State R.O.T. rate of 4% extended to repair and alteration of real property or to real estate contracts would bring in more than \$20 million a year (see Illinois Legislative Council, File 7-535, January 1970).
- (7) The public utility tax on sales of gas, electricity and telephone and telegraph messages at the current rate of 5% is estimated to yield around \$160 million for fiscal 1972. An additional 1% to this rate would yield some \$32 million a year.
- (8) The State insurance premium tax for fiscal 1972 at a rate of 2% on gross premiums on all foreign insurance companies doing business in Illinois is estimated to yield \$53 million for fiscal 1972. An additional 1% to the rate on such premiums would yield approximately \$26.5 million.
- (9) The corporate franchise tax is estimated to yield for fiscal 1972 around \$25 million (the present rate is one tenth of 1% of stated capital and paid-in surplus, with a minimum of \$25 and a maximum of \$1 million).
- (10) The State cigarette tax at a rate of 12¢ per package is estimated to yield \$147 million for fiscal 1972. A

rate of 1% is estimated to yield \$12-1/4 million in a 12 month period.

- (11) The liquor taxes for fiscal 1972 are estimated to yield around \$72 million. The rate on distilled spirits is \$2 per gallon, wine at 23¢ to 60¢ per gallon, and beer at 7¢ per gallon.
- (12) For your convenience, may I list the revenues expected for fiscal 1972 from what may be classified as fees and miscellaneous taxes as follows:

Racing taxes to General Fund	\$ 27,000,000
Interest on State investments	44,000,000
Real Estate Transfer Tax	
(State's share)	2,000,000
Hotel Tax	9,500,000
R. O. T. collection fee (local governments)	4,000,000
Illinois Central R.R. Franchise	4,250,000
Private Car Lines	2,250,000
S. O. T. Trust Fund	16,000,000 (one shot proposition)
Auto Title Registration Fees	6,000,000
Supt. of Public Instruction (reimbursement from Dept. of Public Aid)	4,750,000
Dept. of Registration & Education	3,500,000
Rentals from School Building Commission	2,750,000
Miscellaneous Fees and Dept. Earnings (Fees of Departments, liquor licenses, Public Assistance Recovery fees, financial examination fees, etc.)	4,000,000
	<hr/>
	\$130,000,000

Classification of Ad Valorem Personal Property — The new State Constitution provides, as mentioned above, that the General Assembly may classify personal property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation (Article IX, Section 5(a)). Under this provision, some legal authorities believe that the General Assembly could classify personal property for taxation purposes, and then under the provisions of Article IX, Section 5(c) abolish what is left on or before January 1, 1971. If the Courts would follow this interpretation, then the General Assembly could possibly:

- (a) Classify ad valorem personal property into two classes: (1) non income producing personal property with no value, and (2) income producing personal property with value. This would be a classification according to use, but difficult to administer because of the difficulty of drawing the line between income and non-income producing personal property.

Of course, it should be remembered that this would not be welcomed by the farmer and the small merchant around the square or in Mound City.

- (b) Classify ad valorem personal property into two classes: (1) give each taxpayer, including both individuals and business an exclusion of from \$10,000 to \$20,000 of the equalized assessed valuation; and (2) assess and tax every assessment above this figure as it is presently taxed. If such a classification would hold up under the provisions of Article IX, Section 5(a), it has merit in that it gives relief to all taxpayers, does not discriminate, and comes closest on a statewide basis to giving the relief

granted under the provisions of the amendment submitted to the voters last November 3, 1970, and approved by them by a ratio of approximately 7 to 1.

In conclusion, I would like to reiterate that the people of the State of Illinois are mad and upset because of the reimposition of the personal property tax on an ad valorem basis as a result of the Court decision on individuals, especially since they believed that they terminated such tax by their action at the polls last November. As Legislators, I know that you are receiving a lot of flak from your constituents back in your districts. The most popular thing to do would be to abolish immediately the entire personal property tax, both on individuals and business, as outlined in the new Constitution, and replenish lost revenues to local governments to the tune of around \$300 million from present State income tax revenues. However, as popular as this would be, I would like to point out as a reasonable man that I do not think that this type of action is possible.

Also, some form of classication may be possible, but it will possibly have administervative problems.

In the long run, we would all probably be better off in the State of Illinois if there were time to think and prepare a reasonable program for the abolition of this tax and pass the necessary legislation at the legislative session next spring. If the General Assembly and the Administration think that it is a "must" that the personal property tax be abolished this fall, I would advise the General Assembly to replace the lost revenues to local governments under the mandate of the new Constitution by a well balanced tax program so that no one segment of society, whether that segment be individuals or business, would be unfairly treated. Any other action in the long run would be damaging to Illinois' economic climate.

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APPENDIX F

August 19, 1971

Robert J. Lehnhausen
Director, Dept. of Local Government Affairs
State of Illinois
325 W. Adams Street
Springfield, IL 62704

Dear Sir:

Enclosed is a copy of the Resolution adopted by the Rock Island County Board of Supervisors at their regular monthly meeting on August 17, 1971. The same is being forwarded to your office for whatever action your department deems necessary.

It is the opinion of my office that this particular Resolution has no legal effect whatsoever upon the statutory obligations of the Supervisor of Assessments and/or the Board of Review and I will advise these officials accordingly.

Since it is apparent that this situation is somewhat unique, I would be extremely hesitant to make any statements as to the exact point in time at which your department will intervene in this situation and issue an order, pursuant to the appropriate provisions of the Revenue Act.

Since it is my opinion that the Supervisor of Assessments or the Board of Review could proceed to assess the personal property in Rock Island County which was obviously omitted by the township assessors, there is still a possibility that local officials will make an effort to assess personal property according to law. I do not feel, however, that I can make any statements on behalf of the Supervisor of Assessments or the Board of Review at this time.

If you desire any additional information in respect to this matter, do not hesitate to contact my office. My staff

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and I will make every effort to co-operate with your department in reaching a satisfactory solution to this problem.

Very truly yours,

s/ **James N. DeWulf**
James N. DeWulf
State's Attorney

RESOLUTION

WHEREAS, The taxpayer of the County of Rock Island have been assessed for the year 1971 for taxes to be extended and collected in 1972 pursuant to the law of the State of Illinois as the same existed from and between the dates of April 1, 1971 and first day of June 1971, and

WHEREAS, the Supreme Court of Illinois has subsequent to the dates herein above mentioned pronounced that certain referendum mandate relating to personal property taxation duly voted by the electorate is now discriminatory, ineffective, and void, and

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF SUPERVISORS OF ROCK ISLAND COUNTY, ILLINOIS, on behalf of the taxpayers of the County of Rock Island that no funds be made available or committed to a retroactive assessment of personal property for the year 1971 and that as a statement of policy determines that no such further assessment shall be made in the County of Rock Island for the year 1971.

ADOPTED BY THE BOARD OF SUPERVISORS OF ROCK ISLAND COUNTY, ILLINOIS THIS 17th DAY OF AUGUST, 1971.

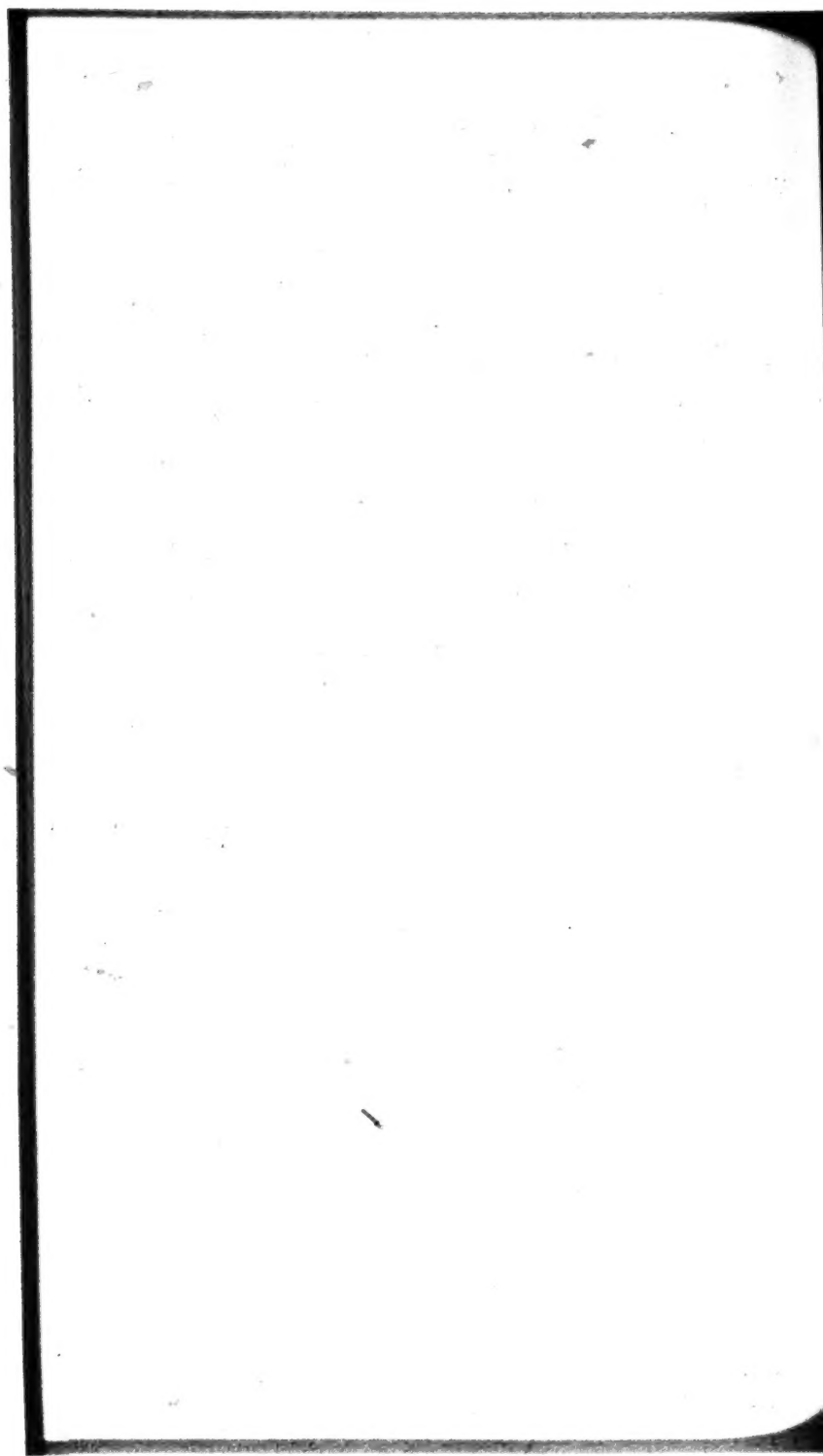
24—Yes.

10—No.

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FILE COPY

IN THE

Supreme Court of the United States

NOVEMBER TERM, A.D. 1971

Supreme Court U.S.
FILED
NOV 22 1971
E. ROBERT SEAVER, CLERK

No. — **71 - 691**

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

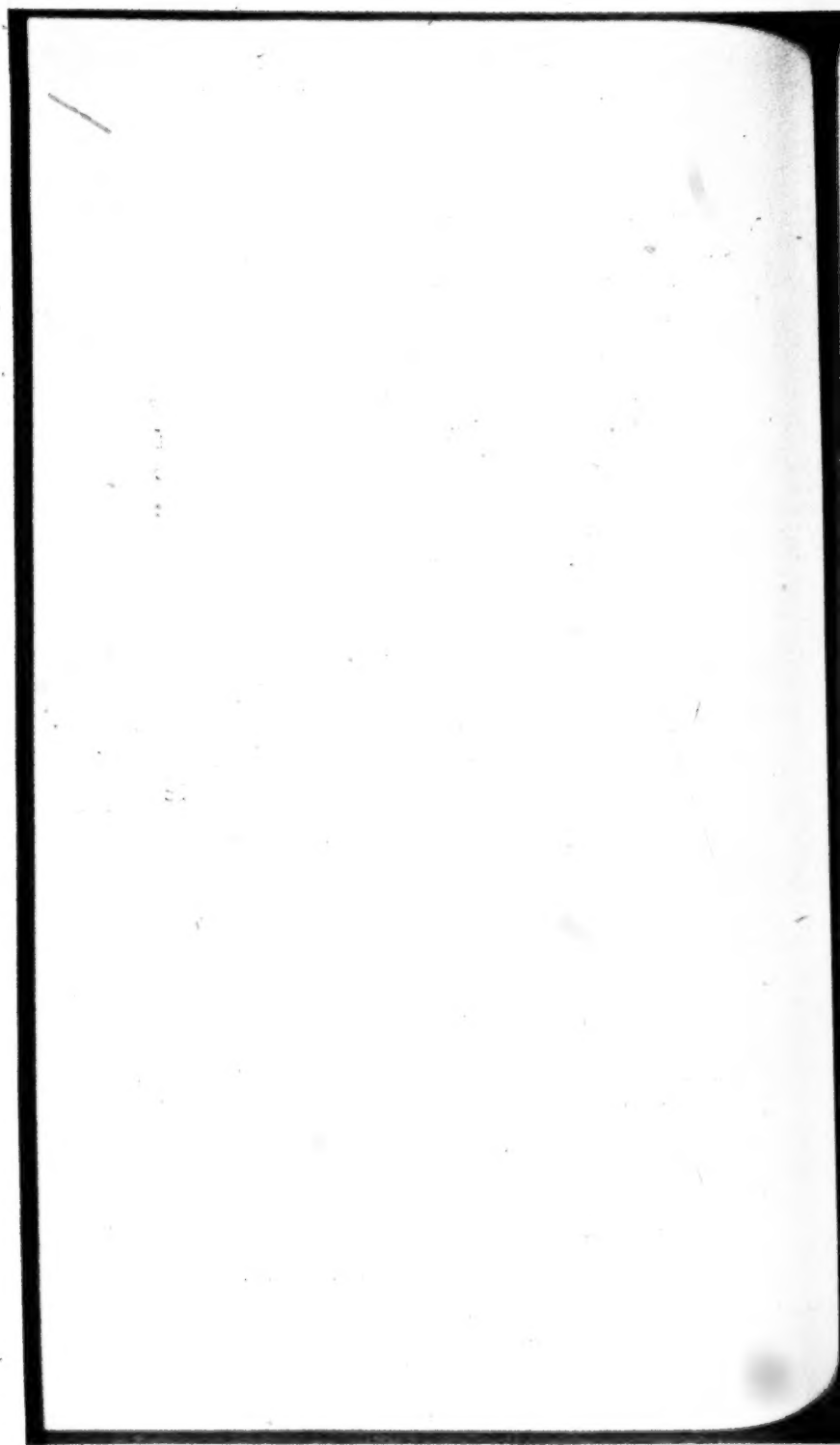
**PETITION FOR WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT**

EDWARD V. HANRAHAN,

State's Attorney,
County of Cook,
Room 500 — Civic Center,
Chicago, Illinois 60602,
Tel. (312) 321-5440,

Attorney for Petitioners.

AUBREY F. KAPLAN,
PAUL P. BIEBEL, JR.
Assistant State's Attorneys,
Of Counsel.



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<ol style="list-style-type: none"> 1. This case involves principles, the settlement of which, is of importance to the public, as distinguished from that of the parties. These petitioners, respectfully submit, that the grave import of the issues before the state court, alone, invite this Court's close consideration to petitioners' request for this Court's review of that decision. 18 2. The State court singularly ignored, and failed to follow and apply the substantive rule of law established by that court, imposed unvaryingly, and, indeed, invoked <i>sua sponte</i> by that court prior to this case. Proper supervision by this Court of the State judiciary demands that the state court be set aright. 18 3. The consequence of the state court's failure to apply the established law in that state is the denial by that court of consideration of the new (1970) Illinois Constitution which results in a conclusion reached by that court that the public policy of the State of Illinois failed to sustain Article IX-A, whose constitutionality 	

under the Fourteenth Amendment was assailed. Such failure constitutes error of such gross magnitude that such misprision by that court compels this Court's review. 25

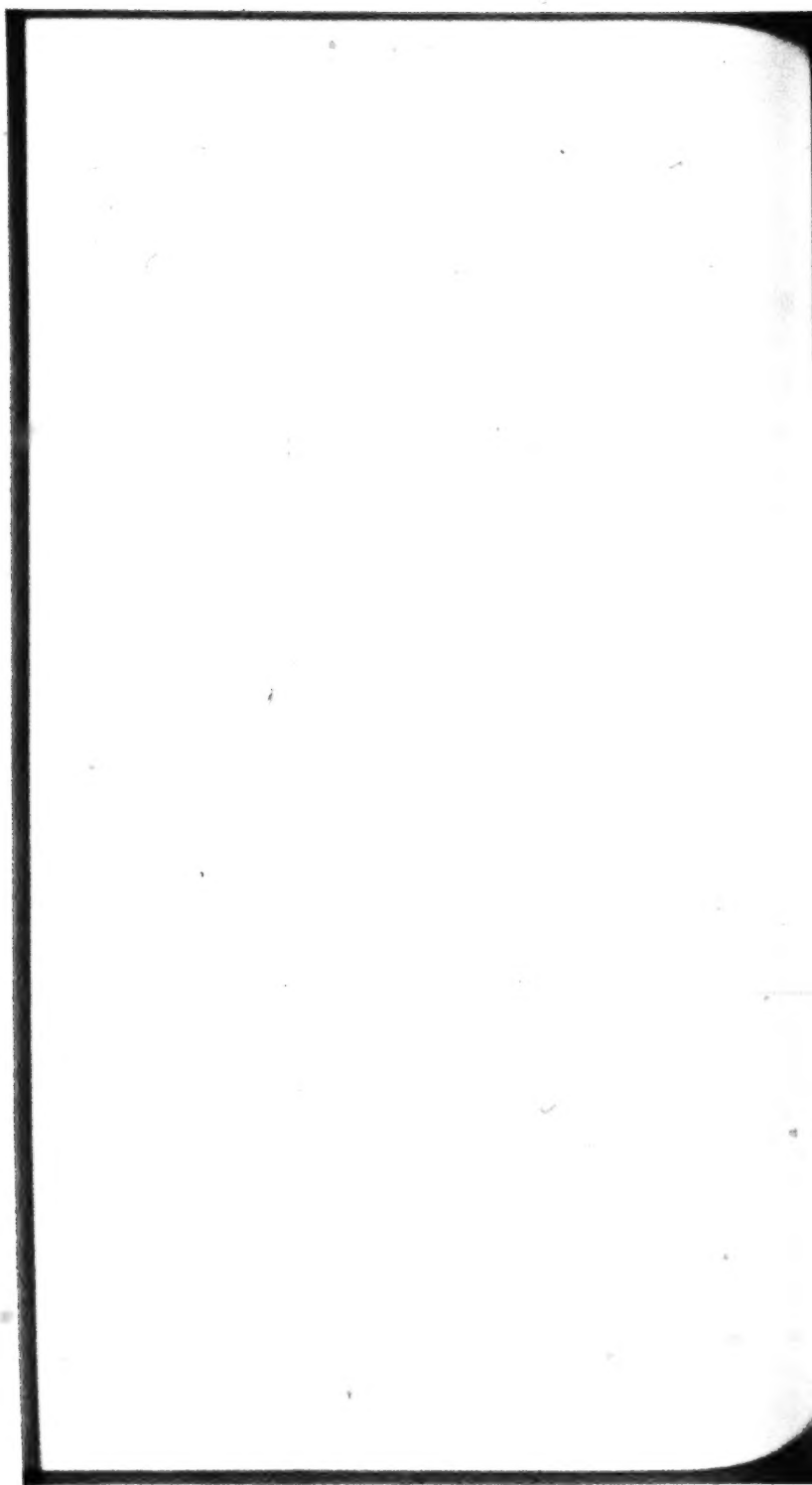
4. The opinion of the state court results in the denial to these petitioners of due process of law and equal protection of the law within the intent of those clauses of the Fourteenth Amendment for the reason that the presently standing opinion of that court denies these petitioners a fair trial within the definition declared by this Court. 36

Conclusion 39

Appendix (filed under separate cover) Opinion and Judgment of Illinois Supreme Court (both majority and dissent) and opinions of the trial courts.

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IN THE

Supreme Court of the United States

NOVEMBER TERM, A.D. 1971

No. —

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

The petitioners, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Illinois Supreme Court entered in this proceeding on July 9, 1971, in the cases consolidated by that court, Nos. 44199, 44308, 44432. That judgment held obnoxious to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, a recent amendment to the 1870 Constitution of the State of Illinois, which amendment was submitted to and approved by the electorate of the State of Illinois on November 25, 1970, and became effective on January 1, 1971.

In addition to this Petition for Writ of Certiorari filed by these petitioners, co-defendant below, Robert J. Lehnhausen, Director, Department of Local Government Affairs of the State of Illinois, has advised that a Petition for a Writ of Certiorari will be separately sought by him. As of the time the Petition for Writ of Certiorari of these petitioners was sent to the printer for final printing, these petitioners have not been in receipt of Director Lehnhausen's Petition. Under this circumstance that co-defendant below is designated as respondent here.

OPINION BELOW

The Opinion of the Illinois Supreme Court, and the dissent to that majority opinion, are reported in the Illinois Supreme Court Advance Sheets, 48 Ill. 2d, and appear in the Appendix hereto. Also appearing in that Appendix are the Opinions issued by the trial courts in the two of the three cases which were consolidated by the Illinois Supreme Court. The third case was an original proceeding in that court.

JURISDICTION

The Judgment of the Illinois Supreme Court was entered on July 9, 1971. A timely Petition for Rehearing was denied by that court on August 24, 1971. That court's Order of Denial appears in the Appendix hereto. This Petition for Certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the highest court of a State can ignore the existence of a new (1970) Constitution of that State;—

Which Constitution had been adopted, and by its terms went into effect and became the Supreme Law of that State prior to, and *was in effect at the time* of that court's decision of a case directly challenging the Federal constitutionality of a recent Amendment to the prior (1870) Constitution of that State; and,—

Which Amendment had previously been submitted to, and was overwhelmingly approved and adopted by the electorate of that State as the first step of the program provided in the new Constitution for the eventual abolishment of the personal property tax in that State; and—

Despite the fact that it was properly urged in both pleadings and oral argument to that court that the integral significance of the new Constitution to the Amendment challenged, proved the immunity of the Amendment to the infirmity charged; and despite the fact that the highest court of that State, without significant exception, up to that case had declared that the law of that State required that court to apply the law as the law existed at the time that case was decided by it and not the law in existence at the time that case might have arisen; and,

Whether, in a matter of such ultimate public consequence, and involving consideration of such exquisite juridical intimacy as that compelled by the concurrence of the unique triumvirate of prior State Constitution, current State Constitution, and Federal Constitution; and where the import of each to the other, and all of which, has been directed to the attention of that court,—under such circumstances, can that court ignore the existence of one member of that triumvirate (the new State Constitution) so totally, that the Opinion issued by that court is utterly devoid of any mention, or even the slightest intimation, that a new Constitution was in effect in that State at any

time, either before, or during the pendency of that case before that court; and,

Whether the highest court of a State can ignore the existence of a new State Constitution,—the presence of which has been properly directed to its attention, and the import of which on the issue before the court has properly been urged;—and circumscribe the extent of its examination in determining the public policy of that State to inquiry exclusive of that new Constitution; and

Whether, under such circumstances, the highest court of a State can avoid, by absence of any mention in the Opinion it issues, its obligation, and, indeed, its duty,—in a case of great State import and grave future consequence to the general public of that State—, to address itself to substantial issues raised, consider vital facts urged, and refrain from recognizing, publishing, confronting, and disposing of such matters.

Whether the Illinois Supreme Court committed grave error in miscomprehending what the public policy of that State was, by ignoring the fact that the public policy of that State as that public policy was declared by the electorate to be, found expression in the embodiment of both prior Article IXA and the new Constitution, and not absent either;—and then, in holding that the public policy of that State, as so miscomprehended by that court, was not of a dignity, sufficient under this Court's teaching, to be a compelling, if not the decisive factor in sustaining the classification whose reasonableness under the equal protection clause was questioned.

2. Whether the highest court of the State of Illinois, although properly employing the basic criterion established by this Court to measure conformance to the equal protection clause of the Fourteenth Amendment of classi-

fications, subject to or excluded from taxation as determined to be appropriate by that State,—has improperly interpreted and applied the pronouncements of this Court, and reached a conclusion wholly beyond the protection which, this Court teaches, that clause of the Fourteenth Amendment was intended to assure.

3. Whether the highest court of the State of Illinois, by ignoring that State's new Constitution, the existence of which was properly directed to its attention, and the vital significance of which constitution to the issue before that court was properly urged; and by refraining, in its Opinion, from any mention whatsoever of any of these matters, has, by such avoidance in its Opinion, caused to be born a substantial Federal question impelling this court's consideration, for the reason that such conception by that court results in the denial to these petitioners of due process of law and the equal protection of the law, which entitlement and protection to all persons, including these petitioners, the Fourteenth Amendment was intended to assure.

Petitioners submit that answer to these questions impels this court's consideration and the issuance of this court's Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

Fourteenth Amendment, Section 1.

(Equal protection and due process clauses)

"All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTIONS OF THE STATE OF ILLINOIS: 1870 Constitution, Article IX.

"§ 1. Tax by valuation, how levied

The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers inn-keepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

1870 Constitution, Amendatory Article IXA, in effect January 1, 1971.

"Article IX-A

TAXATION OF PROPERTY

"§ 1. Taxation of personal property prohibited

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*"

"SCHEDULE

"Paragraph 1. This amendment shall become effective January 1, 1971."

1970 CONSTITUTION: Article IX, in effect July 1, 1971.

"SECTION 1. STATE REVENUE POWER

The General Assembly has the exclusive power to raise revenue by law except as limited or otherwise provided in this Constitution. The power of taxation shall not be surrendered, suspended, or contracted away.

SECTION 2. NON-PROPERTY TAXES—CLASSIFICATION, EXEMPTIONS, DEDUCTIONS, ALLOWANCES AND CREDITS

In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

SECTION 3. LIMITATIONS OF INCOME TAXATION

(a) A tax on or measured by income shall be at a non-graduated rate. At any one time there may be no more than one such tax imposed by the State for State purposes on individuals and one such tax so imposed on corporations. In any such tax imposed upon corporations the rate shall not exceed the rate imposed on individuals by more than a ratio of 8 to 5.

(b) Laws imposing taxes on or measured by income may adopt by reference provisions of the laws and regulations of the United States as they then exist or thereafter may be changed, for the purpose of arriving at the amount of income upon which the tax is imposed.

SECTION 4. REAL PROPERTY TAXATION
(Has no bearing)

SECTION 5. PERSONAL PROPERTY TAXATION

(a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.

(b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.

(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes shall not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3 (a) of this Article.

SECTION 6. EXEMPTIONS FROM PROPERTY TAXATION

The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes. The General Assembly by law may grant homestead exemptions or rent credits.

SECTION 7. OVERLAPPING TAXING DISTRICTS (Has no bearing)

SECTION 8. TAX SALES (Has no bearing)

SECTION 9. STATE DEBT (Has no bearing)

SECTION 10. REVENUE ARTICLE NOT LIMITED (Has no bearing)"

STATEMENT OF THE CASE

Illinois Constitution of 1870 was in effect at all times prior to January 1, 1971. Section 1 of Article IX, the Revenue Article, of that 1870 Constitution directed as follows:

Taxation of Property—Occupations—Privileges.

§ 1. The General Assembly shall provide such revenue as may be needful, by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, mer-

chants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor-dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates.

In accordance with that mandate, the General Assembly of the State of Illinois did enact such legislation, which appears in Illinois' statutes as the Revenue Act of 1939, Chapter 120, sections 482 *et seq.*, Ill. Rev. Stat. 1969. Sections 528-560 provide for the taxation of personal property by valuation as to all persons (with the exception of certain usual and recognized exemptions not relevant) without regard to the nature, character, ownership, or the use of that personal property either to produce income or its use for non-income productive purposes.

On February 27, 1970, the Secretary of State, pursuant to law, did cause to be printed, did certify and did publish a document setting forth a proposed amendment (Article IX-A) to be added to Illinois' Constitution of 1870, an explanation of the proposed amendment, the arguments for and against that amendment, and the form in which that amendment would appear upon a separate blue ballot to be submitted to the electorate of the State of Illinois. That document, absent the arguments for and against the proposed amendment, is as follows:

**"AMENDMENT
to the
CONSTITUTION OF ILLINOIS
THAT WILL BE SUBMITTED TO THE VOTERS
NOVEMBER 3, 1970**

This folder includes

**PROPOSED AMENDMENT TO CONSTITUTION,
EXPLANATION OF PROPOSED AMENDMENT
ARGUMENTS IN FAVOR OF PROPOSED
AMENDMENT
ARGUMENTS AGAINST PROPOSED
AMENDMENT
FORM OF BALLOT**

(Seal of the State of Illinois)

Published in compliance with Statute

by

PAUL POWELL

Secretary of State

To the Electors of the State of Illinois:

At the general election to be held on the 3rd day of November, 1970 a blue ballot will be given to you and you will be called upon in your sovereign capacity as citizens to adopt or reject the following proposed amendment to the Constitution of Illinois.

PROPOSED AMENDMENT TO ADD

ARTICLE IX-A

**(Prohibition of taxation of personal
property by valuation as to individuals.)**

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971.

EXPLANATION OF AMENDMENT

(See Form of Ballot)"

The form of that ballot and the ballot submitted to the electorate at the state-wide general election held on November 3, 1970, identically contain the explanation of that amendment (Article IX-A), as follows:

"FORM OF BALLOT

PROPOSED AMENDMENT TO ADD ARTICLE IX-A

(Prohibition of taxation of personal property by valuation as to individuals.)

EXPLANATION OF AMENDMENT

The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and **other entities not considered in law to be individuals**. The amendment would achieve this result by adding a new article to the Constitution of 1870. Article IX-A, thus setting aside existing provisions in Article IX, section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations. (Emphasis supplied)

Place an X in blank opposite "Yes" or "No" to indicate your choice.

- ☐ YES For the proposed amendment to add Article IX-A to the Constitution. (Prohibition of taxation of personal property by valuation as to individuals.)"
- ☐ NO

Illinois' Constitution of 1870, was amended by the submission to, and overwhelming approval of Article IX-A by the electorate of the State of Illinois on November 3, 1970, which amendment was declared adopted and became part of that Constitution on November 25, 1970, to be effective January 1, 1971.

These petitioners are the officers of the County of Cook, Illinois, each of whom is charged with responsibilities under, and upon whom the Illinois Revenue Act of 1939 (Ch. 120 S 482 *et seq.*, Ill. Rev. Stat. 1969) imposes and compels the performance by each of them of specific duties relating to the assessment of locally assessed personal property taxes.

These petitioners, upon the adoption of Article IX-A to Illinois' Constitution of 1870, proceeded with their respective duties by the assessment of personal property tax against all property *other than* the personal property "owned by individuals and used for their personal enjoyment and that of their families."

These petitioners construe Article IX-A to intend only the exclusion from taxation of the personal property owned by private persons and used by them for non-revenue production purposes.

These petitioners have always contended, and urge to this Court, that their construction is correct, because, exclusive of any other reasons, no other intention is plausibly inferable from the face of that Amendment and the specific declaration and express assurance submitted to the electorate of that State in the "Explanation of Amendment" that:

"It (Article IX-A) would not affect the same tax levied against corporations and other entities not considered in law to be individuals."

The three cases, consolidated by the Illinois Supreme Court, and in which the judgment sought to be reviewed here was entered, arose from the adoption of Article IX-A and the intention ascribed to that Article by these petitioners.

The Posture Below Of The Three Cases Consolidated

Lake Shore, No. 44199, in which these petitioners were defendants, appeared before the Illinois Supreme Court on appeal by these petitioners-defendants from a judgment of the circuit court (the trial court in Illinois) of Cook County, Judge Walter Dahl, presiding. That judgment, conforming with, and adopting the premise urged by plaintiff-corporation there; held that the effect of Article IX-A was to amend Illinois' Revenue Act of 1939, whereby that Act discriminated against corporations and in favor of non-corporate entities, thus rendering *that Act as so amended*, offensive to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; the consequence of which, that court held, was to render invalid and void, in its entirety, the personal property tax in Illinois.

These petitioners urged the trial court, and, as appellants, urged the Supreme Court to dismiss that complaint for failure to state a cause of action.

The Illinois Supreme Court reversed and remanded *Lake Shore*, directing the trial court to dismiss that complaint.

Maynard, No. 44308, appeared before the Illinois Supreme Court upon leave granted by that court to file that suit in that court as an original action for declaratory judgment. These Petitioners were respondents-de-

fendants there. The petitioners-plaintiffs in that case urged that Article IX-A discriminated unconstitutionally against corporations and prayed for the reimposition of the personal property tax on individuals as that tax was so imposed prior to its removal by the People of the State of Illinois in the Referendum held November 3, 1970, in which referendum the overwhelming majority of the voters of that State declared its prohibition.

These petitioners urged the Illinois Supreme Court to dismiss that complaint for want of capacity of those particular plaintiffs to maintain that action.

The Illinois Supreme Court dismissed the *Maynard* complaint. The order of that court, in full, is as follows:

"And now, on this day, the Court having diligently examined and inspected as well the complaint for declaratory judgment filed by petitioners and the pleas and the Motion by respondents to dismiss the complaint, and being fully advised of and concerning the premises, are of the opinion that the said complaint is not well taken.

THEREFORE, it is considered and ordered by the Court that the said complaint be and the same is hence dismissed."

Shapiro, No. 4432, appeared before the Illinois Supreme Court on appeal by the plaintiffs from the judgment of the circuit court of Cook County, Judge Thomas C. Donovan presiding. Both these petitioners who were defendants there, and the state defendant, filed motions in the circuit court to strike that complaint and dismiss that cause of action. Those motions were addressed exclusively to the merits of the issues raised in the *Shapiro* complaint.

That trial court, sustained the intendment of Article IX-A as urged by these petitioners, and held that the

prohibition against taxation declared there applied only to personal property, owned by individuals (natural persons) and used by them for their personal enjoyment and that of their families. Such tax exclusion, that court held, was immune to charges that the retention of that tax in all other regards imposed, resulted in a classification offensive to the equal protection clause of the Fourteenth Amendment.

The *Shapiro* case was the only one of the three consolidated cases that the Illinois Supreme Court considered on the merits and in which it decided the merits. In the *Shapiro* case, that court held, contrary to the position of these petitioners and the judgment of the trial court, that Article IX-A created an unreasonable classification offensive to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

In none of the three consolidated cases is the timeliness of presentation of the federal constitutional issue improper or in question. The timeliness of those presentations is in accord with the law governing the timeliness of such presentations in the State of Illinois and, these petitioners respectfully submit, appears in accord with the rules and decisions of this Court.

The Grounds Upon Which The Judgment Of The Illinois Supreme Court Lies.

The sole ground upon which the conclusion reached by the Illinois Supreme Court is predicated appears to be the following:

"The new Article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but *solely upon the ownership* of the property. If the property is owned by A,

it is taxable; if it is owned by B, it cannot be taxed." (App. page 13).

Applying the criterion to determine whether classification is reasonable, and which criterion was defined by this Court in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406, to include among its measurements:

... "that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State," (App. page 15),

the Illinois Supreme Court then conceived that:

"Article IX-A must be read against the scheme of property taxation established pursuant to Article IX of the Constitution of 1870,"

Upon the above observations, the Illinois Supreme Court then concluded:

"Against this background the incongruity of the prohibition contained in Article IX-A is apparent. It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set." (App. page 16).

The Illinois Supreme Court thereupon concluded with the following judgment:

"We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the Fourteenth Amendment. Apart from that discrimination, the validity of the Revenue Act is not challenged, and we hold that it is Article IX-A which must fall. The validity of Article IX of the Constitution and of the Revenue Act are therefore not affected." (App. page 17).

It is that judgment and that opinion of the Illinois Supreme Court these petitioners seek this Court to review.

REASONS FOR GRANTING THE WRIT

1. *This case involves principles, the settlement of which, is of importance to the public, as distinguished from that of the parties. These petitioners, respectfully submit, that the grave import of the issues before the state court, alone, invite this Court's close consideration to petitioners' request for this Court's review of that decision.*

The important issue decided in this case is apparent from the judgment of the state court which held offensive to the equal protection clause of the Fourteenth Amendment, and struck down a recent amendment (Article IX-A) to the 1870 Illinois Constitution, which amendment was submitted to, overwhelmingly approved by, and adopted by the electorate of that state on November 25, 1970, to be effective January 1, 1971. *Rice v. Sioux City Memorial Parks Cemetery, Iowa 1955, 349 U.S. 70.*

2. *The state court singularly ignored, and failed to follow and apply the substantive rule of law established by that court, imposed unvaryingly, and indeed, invoked sua sponte by that court prior to this case. Proper supervision by this Court of the state judiciary demands that the state court be set aright.*

The issues before the state court had been joined, and oral argument was submitted and concluded on June 21, 1971, whereafter that case was before that court under its advisement.

On July 1, 1971, the new (1970) Constitution of the State of Illinois went into effect as the Supreme Law of that state.*

* Constitution of 1970: Due to the successful efforts of three legislative study commissions, influential public

On July 9, 1971,—eight (8) days after the new (1970) Constitution went into effect, and while that Constitution was the “Supreme Law” in the State of Illinois, the state court rendered its judgment and opinion sought to be reviewed here.

Bearing in mind the above chronology, the significance of the failure of the state court to apply the rule of law demonstrated below, becomes most apparent, and discloses such gross oversight or error that the attention of this Court to the correction of the judgment below is compelled.

That rule of law succinctly but comprehensively, appears as declared by the state court in *Illinois Chiropractic Society v. Giello*, (1960) 18 Ill 2d 306, at page 310:

‘The rule is well established, however, that where the legislature has changed the law pending an appeal the case must be disposed of by the reviewing court under the law as it then exists, and not as it was when the decision was made by the trial court. (*Fallon v. Illinois Commerce Com.*, 402 Ill.

figures interested in reform, and an overwhelming mandate by the voters, Illinois’ Sixth Constitutional Convention convened in Springfield on December 8, 1969. One hundred and sixteen members—two elected from each senatorial district—met at a nonpartisan Convention to revise, alter, or amend the 1870 Constitution.

After 9 months of in-depth study and debate, the members presented their work-product to the People—one they considered to be workable for 25, 50, or as in the case of the 1870 Constitution, 100 years.

The 1970 Constitution was approved by the electorate in a special election held for that purpose on December 15, 1970, two and one-half months after the Convention adjourned sine die. That Constitution provides it is in force, in that state, July 1, 1971.

516; *People ex rel. Hanks v. Benton*, 301 Ill. 32; *People v. Askew v. Ryan* 281 Ill. 231; *People ex rel. Law v. Dix*, 280 Ill. 158). We are bound, accordingly, to review the present decrees in the light of the 1959 amendment, to determine whether defendants may be entitled to the benefits thereof and to determine its applicability to the present proceeding.'

It suffices to observe that appropriate substitution of the facts here, in place of the facts there, discloses the appositeness of that rule to this case, and the requirement of its application by the state court.

The new Illinois Constitution was in effect. The state court was "bound accordingly, to review" the public policy of that State in the light of the relevance of that Constitution to that public policy.

The application of that rule of law, these petitioners respectfully submit, compels affirmance of the position asserted by them, and the relief sought by them. The state court should have applied that rule of law. Its application would have resulted in that court's judgment other than the one it entered. Absence of the application of that rule well merits this Court's inquiry.

That this rule of law is of such decisive significance, and that its unvarying imposition is demanded, again, and most recently, finds confirmation by the state court in *Hamer v. Mahin*, 1971, 47 Ill. 2d 252.

In that case, in a brief two-page opinion, the state court responded *sua sponte*, and invoked that principle of law to dispose of that case.

That case arose in the September, 1970 term of the state court. That court's judgment and opinion was entered on December 4, 1970.

Article IX-A, the very Article which the state court has now held offensive to the Constitution of the United States, had been declared adopted only ten (10) days prior to that court's judgment, to wit, November 25, 1970 to be in force January 1, 1971.

That court's judgment was rendered there subsequent to the adoption of—but prior to the effective date of Article IX-A.

Indeed, in the instant case, the state court's judgment was not only rendered subsequent to the adoption of, but after the effective date of, and while the new Constitution was in force.

The appositeness between *Hamer* and the instant case is extremely apparent.

These petitioners deem the *Hamer* case to be of such extreme incisiveness to the reasons assigned to this Court for the issuance of its Writ of Certiorari; and the language and reasoning of the state court to be so vital to this Court's complete understanding of the presentation here, that these petitioners beg this Court's indulgence and set out the entire context of the state court Opinion below, and submit that court's Opinion as their demonstration to this Court of the extreme importance of that rule of law, and the vital significance of the failure by that court to apply that rule in this case.

The *Hamer* opinion, in full, is as follows:

"Mr. JUSTICE SCHAEFER delivered the opinion of the court:

This case is a sequel to *People ex rel. Hamer v. Jones*, 39 Ill. 2d 360, decided in March of 1968. In the present case, as in that one, the taxpayers, Paul E. Hamer and June T. Hamer, his wife, sought declaratory relief, an injunction

and relief by way of *mandamus*, with respect to the asserted failure of the defendant, the Director of Revenue of the State of Illinois, to perform his statutory duty to equalize and assess all taxable property at its full, fair cash value.

Like the complaint in the earlier case, the present complaint alleges that the various types of real property in Lake County, "i.e., residential, unsold lots in subdivisions, improved farm lands, commercial and industrial property, have since 1961 and each year thereafter been assessed and equalized at different per centums [sic] less than the full, fair cash value, varying from twenty percent (20%) to fifty-five percent (55%) of full, fair cash value and said property will, in the future, continue to be assessed and equalized at less than full, fair cash value in contravention of the law." The complaint also contains allegations concerning the practices followed in Lake County with respect to the assessment of personal property.

In the earlier case this court affirmed the judgment of the circuit court of Lake County which dismissed the complaint on the grounds that to grant the relief sought would create extreme expense, disastrous disorder, and confusion and hardship for taxpayers. In addition, the court held that the taxpayer plaintiffs had failed to allege sufficient facts to show how they were damaged by the conditions they allege. In the case now before us the order appealed from found that the present complaint had remedied those defects referred to in the earlier case "and complies in all respects with the opinion in the earlier cause." The order further quoted from this court's opinion in that case and continued with the following finding and order:

"4. That it is clear from the court's opinion that the Supreme Court has retained in itself alone the right to determine that point in time when the court

will no longer defer to legislative action in a matter as important to the state as the raising of its revenue.

It is hereby ordered that the above-entitled cause of action be and it is hereby dismissed without prejudice and without costs being taxed."

In his brief the Attorney General thus describes the problem in this case: "For 43 years the legislative mandate has been that all property in the State of Illinois should, for tax purposes, be assessed at its full fair cash value. For many years the administrative branch of the State of Illinois and, more particularly, the Department of Revenue, has not followed and carried out that legislative directive, unquestionably a violation of the legislative directive. For some 11 years plaintiffs-appellants have complained about this violation of the law, and have been engaged in a marathon of litigation seeking to force the Director of Revenue to follow the letter of the law."

Everyone acknowledges that the problem is a difficult one. This court has not, however, intended to retain to itself alone the power to determine when, and to what extent, compliance with the constitutional command of uniformity is to be required.

Since the judgment of the trial court was entered, article IX-A was added to the constitution of the State of Illinois. That article, which becomes effective January 1, 1971, provides: "Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*." Ill. Const., art. IX-A.

The judgment of the circuit court of Lake County is reversed and the cause is remanded for further proceedings in accordance with law. (emphasis supplied)

Reversed and remanded."

In *Hamer*, the state court *sua sponte* observed and invoked the existence of Article IX-A, which, although adopted, was not yet in effect at that time, as authority for that court's declaration there, that:

"This court has not, however, intended to retain to itself alone the power to determine when, and to what extent, compliance with the Constitutional command of uniformity is to be required."

Yet, that same court, in the instant case, having before it the question of the uniformity of classification in Article IX-A, completely ignored and did not even mention the existence of Illinois new (1970) Constitution, declared by the people to be the Supreme Law in that State, and which was in effect at that time, as any authority, whatsoever, worthy of consideration in determining the public policy of that State, relevant to the existence and purpose of Article IX-A.

Such discrimination is offensive to the law, resists rationalization, and, indeed, in itself, denies to these petitioners due process of law and the equal protection of the law under the Fourteenth Amendment.

Puzzling, additionally, is the fact that unlike in *Hamer*, these petitioners did direct the attention of the state court to the existence of the new (1970) Illinois Constitution in their (appellants) Brief (pages 7 and 8) and, again, directed that court's attention in petition for rehearing filed by these petitioners subsequent to that court's entry of its judgment. (Petition for Rehearing pp. 17, 18)

That court denied the petition for rehearing filed by these petitioners without comment or opinion.

The failure of the state court to follow the law established in that state by that court results in a determination by that court of extreme doubtfulness. *Williams v. Lee*, 358

U.S. 217, 218. Proper supervision by this Court of the state judiciary demands that the state court be set aright. This Court should do so here.

3. The consequence of the state court's failure to apply the established law in that state is the denial by that court of consideration of the new (1970) Illinois Constitution which results in a conclusion reached by that court that the public policy of the State of Illinois failed to sustain Article IX-A, whose constitutionality under the Fourteenth Amendment was assailed. Such failure constitutes error of such gross magnitude that such misprision by that court compels this Court's review.

As these petitioners inform above, the existence of Illinois' new (1970) Constitution was directed to the attention of all of the courts of that State, both trial courts and the attention of the highest court of that State, and no rules or law of that State, governing the propriety of the timeliness and manner of presentation of this fact have been ignored or violated.

With all due deference to this Court, these petitioners deem their presentation to the state court of these matters to meet the dignity of presentation of those matters to this Court. Those presentations are re-presented to this Court as petitioners reasons assigned here for the issuance by this Court of its writ of certorari.

In the Brief filed by these petitioners in the *Maynard* case, these petitioners urged to the Illinois Supreme Court as follows:

"II.

"HOLDING ARTICLE IX-A UNCONSTITUTIONAL, AS PLAINTIFF'S PRAY, WOULD FRUSTRATE THE INTENT OF THE ELECTORATE WHO ADOPTED THIS AMENDMENT TO THE ILLINOIS CONSTITUTION OF 1870.

"In addition, we submit that when Article IX-A was adopted by the taxpayers of this State, it was adopted with the expectation that non-revenue producing personalty would be exempt from taxation effective January 1, 1971. And that the tax would continue to be applied to revenue producing property until January, 1979, when the personal property tax was to be totally abolished and replaced by another tax, to be determined by the general assembly. The burden of the replacement tax was to fall on revenue producing property alone. This is provided for in Article IX, Section 5 (b) & (c) of the Illinois Constitution of 1970.

In addition, this section provides that the replacement tax, if it is to be measured by income, be an exception to the 8 to 5 ratio established in Art. IX, § 3(a) of the Ill. Const. of 1970.

If plaintiff's argument that Article IX-A is unconstitutional prevails, the exclusion from taxation of individuals will be void. "Individuals" will therefore remain within the class of persons who are subject to the personal property tax after January 1, 1971. Therefore, when the personal property tax is abolished on or before January 1, 1979, and the replacement tax levied, "individuals" will be subject to that replacement tax. Since the replacement tax, if measured by income, is not subject to the ratio-limitation of 8 to 5, such a tax could well be applied uniformly. That result, we submit, not only frustrates and subverts the intent of the drafters of Article

IX-A of the Illinois Constitution of 1870, and the Ill. Const. of 1970, but the understanding and expectation of the electorate who adopted these measures as well."

Again, in the petition for rehearing filed by these petitioners in the state court, they urged the following:

"POINT II"

"This Court Has Overlooked The Intimate Relationship, Interdependence, And Integral Consanguinity Between Article IX-A Of Illinois' Constitution Of 1870, And Revenue Article IX, Sections 5 (b) (c) And Section 3 (a) Of Illinois' New Constitution Of 1970, In Effect In This State Since July 1, 1971. It Is Both Of These Articles, Together, As One Entirety, (Not, As Misapprehended By This Court, Article IX-A, Alone) Which Impart The Purpose Sought To Be Accomplished And The Policy Of This State Declared By Its People To Be The Abolishment Of ALL Personal Property Tax In The State Of Illinois; And, As Well, The Policy Of This State As To The Removal Of That Tax From The Classes Bearing Its Imposition; And, As Well The Consequences Ensuring To Those Classes Of Taxpayers From Whom The Imposition Of That Tax Is Removed: All In Accordance With The Program Established By The People Of This State To Accomplish This Objective.

Recognition Of This Policy, Declared By The People Of This State To Be The Policy Established In This State, Comes Well Within The Criterion Held To Be Determinative Of The Validity Of Article IX-A, and compels this Court's observance thereto, And The Reversal of Its Present Judgment In Compliance Therewith.

"This Court's presently standing judgment declares Article IX-A violative of the equal protection clause

of the Fourteenth Amendment to the Constitution of the United States. That conclusion emerges, the opinion of this Court informs, because the reasoning employed by the Court compels it to find that the classification established in Article IX-A fails to meet the tests invoked by the Court when passing upon the validity of legislation assailed under the equality clause of the Fourteenth Amendment. This Court's reasoning appears as follows:

First, this Court on Page 17 of its presently standing opinion, declares that,

"The new Article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed."

After that observation, this Court next considers those criteria which are determinative of "reasonableness of classification," and adopts the criterion established on Page 21 of its opinion as the measure appropriate to that determination.

"Mr. Justice Brandeis stated the criterion this way in his dissenting opinion in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406, 48 S. Ct. 553, 72 L. Ed. 927, 932: 'In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the clarification

must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible'." (emphasis supplied)

Immediately following this exposition this Court, then proceeds to apply that criterion to measure the reasonableness of the classification in Article IX-A to ascertain its conformance with the requisite of that criterion "that the object of the classification (intended by Article IX-A) must be the accomplishment of a purpose or the promotion of a policy which is within the permissible functions of the state. . . ."

That answer, this Court conceives, however must appear from and this Court deems its search for this answer to be confined solely to the area of inquiry circumscribed on page 21, as follows:

"Article IX-A must be read against the scheme of property taxation established pursuant to Article IX of the Constitution of 1870, . . ."

Whereupon, this Court then says on page 22, that its search, conducted within the confines of this limited area of inquiry, reveals that:

"Against *this background* the incongruity of the prohibition contained in Article IX-A is apparent. It *cannot rationally* be said that the prohibition *promotes any policy* other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others." (emphasis supplied.)

This Court then concludes:

"We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the fourteenth amendment."

The syllogism employed by this Court from which the conclusion announced by this Court emerges, is predicated upon the major premise found on Page 17 of this Court's opinion and quoted in full above.

This Court has misapprehended the purpose of Article IX-A. Contrary to this court's conclusion, that Article states that notwithstanding any other provisions in any of the laws of this State which impose that tax, the **declared purpose** of Article IX-A is to **remove that tax**, setting aside and holding for naught all provisions of the law which impose that tax. It is Article IX-A which removes the tax imposed. Article IX-A imposes no such tax. That this is so, clearly emerges from the observation that; if the purpose of Article IX-A was to impose such tax it would not have been necessary to submit the question of such tax imposition to the people of this State. That tax was already imposed on them. In addition, if that were the purpose of Article IX-A, these petitioners respectfully submit that article IX-A, when submitted to the people of this State on November 3, 1970, would have suffered the most ignominious defeat at the polls ever recorded in the history of this State.

This Court's premise is that Article IX-A imposes a property tax. Of course then, when Article IX-A is viewed in the light of Revenue Article IX of Illinois new Constitution of 1970 which declares the **abolishment and removal** of that tax, the only conclusion emergent is that these two Articles are in direct conflict, the purpose of each separate and unrelated to each other, and on their face reject identity of objective—to effectuate one policy. Of course, in

this context the comparison of these two conflicting purposes affords no indication of the policy of this State or the purpose for prohibiting prior to July 1, 1971—the effective date of the new Constitution—the imposition of personal property tax on the class intended by Article IX-A; but invites the conclusion reached by this Court on Page 22 of its present opinion that, **solely** against the background of Article IX of Illinois' Constitution of 1870, no State policy is disclosed nor is the accomplishment of any State purpose revealed, other than the removal of that tax from one class of taxpayers, while denying the enjoyment of such removal by other classes.

However, once the correct premise is discerned, to wit: that Article IX-A declares its prohibition exclusively as to that tax on the personal property owned by individuals and used for their personal enjoyment and that of their families; the criterion employed by this Court to determine the reasonableness of that classification invokes approval of that sole application of that prohibition to that class alone. The object of that classification then is discerned to be the initial and necessary step in the accomplishment of a purpose and the promotion of a policy which is within the permissible functions of this State.

This conclusion necessarily follows because, then, when Article IX-A of the 1870 Constitution is viewed in the light of Revenue Article IX of the new 1970 Constitution, it appears that both Articles deal with the **removal** of that tax and are integrally essential to the accomplishment of, and dedicated to the effectuation of the policy declared by the people of this State. A policy selected and approved by them: the abolishment, elimination and removal of that tax.

For this Court's convenience of comparison, Section 5 of Article IX of Illinois' new Constitution of

1970, as well as Section 3 (a), is set out in full as follows:

"Section 5. PERSONAL PROPERTY TAXATION

(a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any of all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.

(b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.

(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes shall not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3(a) of this Article."

"Section 3. LIMITATIONS ON INCOME TAXATION

(a) A tax on or measured by income shall be at a non-graduated rate. At any one time there may be no more than one such tax imposed by the State for State purposes on individuals and one such tax so imposed on corporations. In any such

tax imposed upon corporations the rate shall not exceed the rate imposed on individuals by more than a ratio of 8 to 5."

These petitioners respectfully submit that once the misapprehension resulting in the present judgment is discerned, the import of the relationship between Article IX-A of the 1870 Constitution and Article of the new 1970 Constitution readily emerges. Likewise, readily emergent, is the significance of the synthesis and entire reliance of the new Article IX upon the established existence, the validity of the existence and the continued existence of Article IX-A, and the importance of the consideration of both old and new Articles in the determination of the declared policy of the State of Illinois; of which, it is apparent, Article IX-A is but the initial step in the accomplishment of the policy declared by the people of this State to be the abolishment of that tax. (See also Brief of County Defendants Edward J. Barrett, et al., Point II, P. 7.)

The policy of this State thus overwhelmingly appears and resoundingly declares the abolishment of that tax on *ALL* personal property in the State of Illinois wherever situated; whatever its ownership; and howsoever used. That policy declares as well the removal of that tax from the classes bearing its imposition and declares as well the consequences ensuring to classes of taxpayers from whom the imposition of that tax is removed; and, as well, that the removal of that tax be accomplished in accordance with, and in the manner prescribed in the program established by the people of this State to accomplish the eventual removal of the imposition of that tax from all classes of taxpayers by January 1, 1979.

These petitioners respectfully submit that the foregoing observations should compel this courts reconsideration and this courts agreement with the posi-

tion of these County officer defendants-petitioners and the granting of the relief for which they have prayed.

This Court will recall that, on oral presentation, the State's Attorney of Cook County directed the Court's attention to personal property tax collection reports which were provided by the Cook County Defendants. These reports reflect the collection of \$149, 657, 296.21 in Cook County for the year 1969. Of this sum only \$1,975,983.46 was collected from 318,881 "Individuals" (the term "Individual" does have a technical meaning in Personal Property Tax administration and practice if not in law), while \$147,771,312.85 was collected from 170,129 "non-individual" taxpayers.

This comparison is resubmitted for this Court's reconsideration, to demonstrate the insignificance of the economic consequences to tax supported bodies resulting from the removal of that tax from the class intended by Article IX-A, contrasted with the social and administrative advantage of reducing the number of taxpayers on the rolls by nearly two-thirds. We submit that these consequences are the essence of reasonableness; and that they reenforce these defendants thesis that Article IX-A does not stand alone as an isolated instance of the removal, or imposition, of a tax. **BUT**, to the contrary it is the initial, integral step in a single unified program which, when completed will eliminate the personal property tax in its entirety and remove its burden from each and every class of taxpayer. **AND**, that Article IX-A of the 1870 Constitution and Article IX of the 1970 Constitution bear a symbiotic relationship each to the other; so that violence done to one is violence done to its companion.

Indeed, this Court's presently standing opinion and judgment seriously impugns the constitutional integrity of Article IX of the Illinois Constitution of 1970."

The public policy of the State of Illinois, as that policy appears from Article IX A and the new 1970) Constitution patently declares the abolishment of the personal property tax in Illinois. That public policy, just as patently, declares that such abolishment shall not be done by one sweeping blow because of the dire consequence which would enure to the state's revenue by such instant total abandonment, but to the contrary, and most perspicaciously, provides for such accomplishment over a period of time, and in several stages whereby the economy and replacement revenue of the State appropriately can be adjusted and attuned to the gradual removal of that tax.

Indeed, the public policy of that State, in the recognition of the problems with which that State would be confronted, establishes a program and provides for a procedure no different than that declared by this Court to be most appropriate to similar circumstances and concerns in the School Desegregation Cases. There, this Court refused to find offensive, but, to the contrary, recognized as necessary that the resolution of problems of grave public concern and consequence, often require for their ultimate realization, accomplishment in graduated steps and progressive stages. That recognition finds exquisite identity here.

These petitioners respectfully submit that the foregoing facts, reasons, and argument should have persuaded the state court initially, to recognize the existence of the new (1970) Illinois Constitution; appreciate the integral relationship between Article IX-A of the 1870 Illinois Constitution and the new (1970) Constitution; apply the established rule of law whose application these petitioners respectfully submit, is compelled in that state; and pub-

lish in the Opinion of that court, meet, and dispose of this extremely vital factor and issue. Failure by that court to do so resulted in a judgment rendered by that court wholly inconsistent with the public policy of that State, contrary to the law of that State, and refuted by the teachings and decision of this Court.

These petitioners respectfully submit that these considerations should invoke this Court's order granting this petition and the relief these petitioners seek.

4. The opinion of the state court results in the denial to these petitioners of due process of law and equal protection of the law within the intent of those clauses of the Fourteenth Amendment, for the reason that the presently standing opinion of that court denies these petitioners a fair trial within the definition declared by this Court.

These petitioners respectfully submit that the following chronology demonstrates, most probably best of all, the intimacy and integral relationship between Article IX A of the 1870 Constitution, and the new (1970) Constitution, and that the embodiment of both, and not either alone, declare the public policy of the State of Illinois, and illumines the error manifest in the judgment entered by the state court which utterly ignored even the very

1970 CONSTITUTION

December 9, 1969—Illinois Sixth Constitutional Convention Convened.

October 1, 1970—Constitutional Convention Adopted New Constitution and Adjourned.

December 15, 1970—Adopted By Electorate At Special Election.

July 1, 1971—To Be In Effect.

ARTICLE IX A (1870 Constitution)

February 27, 1970—Disseminated to Electorate,
Notice, Etc. Of Proposed Amendment.

November 3, 1970—Approved By Electorate.

November 25, 1970—Declared Adopted & Be-
came Part Of 1870 Constitution.

January 1, 1971—To Be In Effect.

JUDGMENT OF STATE COURT

July 9, 1971.

In addition to the reasons assigned under the preceding point, the concurrence, and immediacy of occurrence, of both Article IX to the 1870 Constitution and the new (1970) Constitution, as shown above, without more, proves their consummate singleness, and totally rejects the State court's attempt at their divorcement.

It appears that the new (1970) Constitution was submitted to and adopted by the electorate of that State on December 15, 1970. That Constitution declares the abolishment of all personal property tax in that State, and publishes the program for such eventual total removal, and the method employed for such accomplishment. As heretofore observed, paragraph (b), section 5 of Revenue Article IX of the new (1970) Constitution specifically prohibits the imposition of any tax theretofore abolished. It reads as follows:

"Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated."

If Article IX-A, then, is not an integral part of, and the first step in the program declared to be the public policy in that State for the eventual abolishment of all those taxes, then no need would exist for such specific admonishment in the new (1970) Constitution.

Of course, the public policy of that State in regard to the passage and purpose of Article IX-A cannot be determined absent examination of the Revenue Article of the new (1970) Constitution.

Again, it defies reasonableness to assume that the electorate were unaware of the identity between Article IX-A and the new (1970) Constitution, and the purpose of both to accomplish the ultimate removal of that tax from everybody in accordance with the program established.

Every media, in every way, informed and instructed the electorate as to every component, proposed and adopted in both Article IX-A to the 1870 Constitution, and the new 1970 Constitution, continually, from the date Illinois Sixth Constitutional Convention convened on December 9, 1969, through the approval of Article IX-A to the 1870 Constitution, on November 3, 1970, and through the adoption, less than five (5) weeks after that, of the new Constitution, on December 15, 1970.

Of course, determination of the public policy of that State demands measurement by Illinois new (1970) Constitution.

Again, why the need, at all, to submit Article IX-A to the electorate for approval on November 3, 1970, when the new (1970) Constitution was to be submitted to them just a few weeks after that, on December 15, 1970, unless the passage of Article IX-A was an integral factor, the

precedent occurrence of which was comprehended by the Revenue Article in the new (1970) Constitution, as, indeed, that article does comprehend.

Of course, the public policy of the State of Illinois demands, for proper focus, consideration of Illinois new (1970) Constitution.

The failure of the state court to observe and apply these considerations constitutes error so manifest that such oversight, indeed, denies to these petitioners the fundamental right to a fair trial assured them by the due process and equal protection clauses of the Fourteenth Amendment.

Petitioners respectfully submit that the reasons assigned here should invoke this courts inquiry and consideration.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Illinois Supreme Court.

Respectfully submitted,

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FILE COPY

Supreme Court, U.S.

FILED

NOV 22 1971

ROBERT SEEVER, CLERK

IN THE

Supreme Court of the United States

NOVEMBER TERM, A.D. 1971

No. — 81-691

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

VS.

CLEMENS K. SHAPIRO, et al.,

Respondents.

APPENDIX to Petition

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IN THE

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NOVEMBER TERM, A.D. 1971

No. _____

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

APPENDIX

**ORDER OF THE SUPREME COURT OF
ILLINOIS
DENYING PETITIONS FOR REHEARING
UNITED STATES OF AMERICA**

State of Illinois)
) ss.
Supreme Court)

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of May in the year of our Lord, one thousand nine hundred and seventy-one, within and for the State of Illinois.

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE
JUSTICE WALTER V. SCHAEFER
JUSTICE DANIEL P. WARD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE CHARLES H. DAVIS
JUSTICE HOWARD C. RYAN

WILLIAM J. SCOTT, ATTORNEY GENERAL

ROBERT G. MILEY, MARSHAL

ATTEST: JUSTICE TAFT, CLERK

Be It Remembered, that, to-wit: on the 24th day of August, A.D. 1971, the same being one of the days in vacation after the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Lake Shore Parts Co. et al., etc.,

Appellees

Nos. 44199, 44308, 44432, Cons.

v.

Bernard J. Korzen, etc., et al.,

Appellants

Appeal from Circuit Court Cook County

And now, on this day, the Court having duly considered the petitions for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petitions and denies the petitions for rehearing.

APPENDIX

Nos. 44199, 44308, 44432

Supreme Court of Illinois

July 9, 1971

Rehearing Denied Aug. 24, 1971

LAKE SHORE AUTO PARTS CO., et al.,

Appellees,

v.

**BERNARD J. KORZEN, County Treasurer and ex officio
County Collector of Cook County, et al.,**

Appellants.

EUGENE L. MAYNARD et al.,

Petitioners,

v.

**EDWARD J. BARRETT, County Clerk of Cook County,
et al.,**

Defendants.

CLEMENS K. SHAPIRO et al.,

Appellants,

v.

**EDWARD J. BARRETT, County Clerk of Cook County,
et al.,**

Appellees.

SCHAEFER, Justice.

These consolidated cases present issues concerning the construction and the validity of article IX-A which was added to the constitution of 1870 by referendum vote at the November 1970 election. On June 30, 1969, the Senate and the House of Representatives concurred in the adoption of Senate Joint Resolution No. 30, which provided for the submission of the proposed amendment to a referendum vote. Senate Joint Resolution No. 30 (Senate Journal, June 30, 1969, p. 3476) is as follows:

"SENATE JOINT RESOLUTION NO. 30

Resolved, By the Senate of the Seventy-sixth General Assembly of the State of Illinois, the House of Representatives concurring herein, that there shall be submitted to the electors of the State for adoption or rejection at the next election of members of the General Assembly of the State of Illinois, in the manner provided by law, a proposition to add Article IX-A to the Constitution, the added Article to read as follows:

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971."

The explanation of the amendment which appeared upon the referendum ballot is as follows:

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions in Article IX, section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

Subsequently, on May 19, 1970, the Senate adopted Senate Joint Resolution No. 67 (Senate Journal May 19, 1970, p. 6) which contained a further statement of the intention of the General Assembly in adopting Senate Joint Resolution No. 30. Senate Joint Resolution No. 67 was concurred in by the House of Representatives on May 29, 1970 (Senate Journal May 29, 1970, p. 149). It reads as follows:

"SENATE JOINT RESOLUTION NO. 67

Resolved, By the Senate of the Seventy-sixth General Assembly of the State of Illinois, the House of Representatives concurring herein, that, in adopting Senate Joint Resolution No. 30, which submits to the electors of this State a constitutional amendment prohibiting the taxation of personal property by valuation as to individuals, it was the intention of this General Assembly to abolish the ad valorem taxation of personal property owned by a natural person or by two or more natural persons, and that, by the use of the phrase 'as to individuals', this General Assembly intended to mean a natural person, or two or more natural persons as joint tenants or tenants in common."

The first of the three consolidated actions that are before us was filed by Lake Shore Auto Parts Co., a corp-

oration, on December 9, 1970. The complaint named as defendants the county clerk of Cook County, the county assessor, the county collector and the members of the board of appeals of that county, as well as the director of the Department of Local Government Affairs of the State. It alleged that it was filed as a class action on behalf of the plaintiff (hereafter Lake Shore) and on behalf of all other corporations and other "non-individuals" subject to personal property tax. It asserted that the new article IX-A violates the fourteenth amendment to the constitution of the United States because its effect "is to exonerate from ad valorem personal property taxation, on and after January 1, 1971, all personal property owned by 'individuals', while authorizing and requiring the continued ad valorem taxation of all personal property owned by entities other than 'individuals.'" It also alleged that the provisions of article IX-A immediately became a part of and amended the Revenue Act of 1939, so that that statute "imposes ad valorem taxes only with respect to personal property owned by corporations and other entities which are not 'individuals' within the meaning of said Article IX-A." The complaint prayed for a decree "finding and declaring that the provisions of the Revenue Act of 1939 * * *, as amended by Article IX-A of the Constitution of Illinois, are unconstitutional, invalid and unenforceable insofar and to the extent that such statute purports to impose ad valorem taxes with respect to personal property owned by plaintiff and all corporations and other 'non-individuals' who are members of the class which plaintiff represents." An injunction, as well as relief appropriate to a class action, was also sought.

The answers of the defendants denied the legal conclusions asserted by the plaintiff. They did not admit the allegations that related to the representative character

of the action, but they did not dispute any allegations of fact that related to the basic issues.

All parties moved for summary judgment, and the trial court entered an order on March 30, 1971, granting the basic relief prayed for in the complaint, but reserving jurisdiction to determine the class aspect of the action. The order also found that article IX-A is not applicable to personal property taxes the assessment of which was commenced prior to January 1, 1971. The defendant, Robert J. Lehnhausen, Director of the Department of Local Government Affairs of the State of Illinois, has appealed, and the plaintiff has cross-appealed from that portion of the order that related to the particular taxes to which the court's order was applicable.

A petition seeking leave to file an original action in this court was filed on May 10, 1971, on behalf of Eugene L. Maynard, "a natural person, citizen and taxpayer of the State of Illinois," and also on behalf of one high school district and three grade school districts. Leave to file was granted on May 12, 1971. The defendants are those State and county officers who are defendants in the Lake Shore case. The complaint, which sought a declaratory judgment and other relief, alleges the adoption of article IX-A. It is suggested that "the *Lake Shore* case will come to the Court in a flawed condition in that it will not properly present the parties and arguments essential for a full determination of the important revenue question. * * * Without the presence of Eugene L. Maynard, neither the presence nor the position of a natural person will be adequately presented to this Court." The complaint alleged that it was filed by Maynard, who is alleged to own non-business personal property, on behalf of himself and all others similarly situated. It also al-

leged that it was filed on behalf of the named public bodies for themselves and all other public bodies which receive proceeds from personal property taxation.

The deficiencies in parties and in legal arguments in the Lake Shore case is said to lie in the fact that the only plaintiff in that case is a corporation, and in the fact that the complaint in that case does not contain a direct request for a declaration of the unconstitutionality of article IX-A. "The pleadings of that case place into question only certain sections of the Illinois Revenue Act. The attack is made upon these sections as affected by the passage of Article IX-A rather than upon the constitutionality of the Article itself. * * * If the Court considers the *Lake Shore* case without additional parties and arguments, it may be foreclosed from ruling on the central issue of constitutionality of the Amendment."

No new facts were alleged in the Maynard case, and the defendant Lehnhausen has conceded the factual questions and filed a brief to stand as his answer in this case. The brief on behalf of the defendant county officers appears similarly to have been intended to stand as a motion to dismiss the complaint.

Another action was instituted by a complaint for declaratory judgment which was filed in the circuit court of Cook County on May 8, 1971, on behalf of several plaintiffs. Clemens K. Shapiro alleged that he is a natural person who owns personal property in his own name and real property jointly with his wife, none of which property is owned or used for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family. Jerome Herman alleged that he is a natural person and operates and conducts a business as a sole proprietor. Guy S. Ross and Eugene D.

Ross allege that they are natural persons and operate, as a partnership, a business which owns property. M. Weil and Sons, Inc., a corporation, alleges that it is the owner of property situated in Cook County.

The complaint alleges that each of the plaintiffs is acting in a representative capacity on behalf of all others similarly situated. The defendants are those State and county officers who were named in the Lake Shore complaint. The complaint alleges the adoption of article IX-A and asserts various interpretations of that article, some of which are advanced by all of the plaintiffs and others by one or another of the plaintiffs. To this complaint the defendant Lehnhausen, Director of the Department of Local Government Affairs, filed a motion to dismiss on May 9, 1971. He also filed a "Petition for Instructions" which recited that the Lake Shore and Maynard cases were pending in the Supreme Court of Illinois, asserted that the issues in all of the three cases were substantially the same, and that it "would appear to be a duplication of effort for this Court to consider the issues involved in the case at bar [the Shapiro case] while at the same time the Illinois Supreme Court has essentially the same issues before it for consideration." The petition for instructions suggested that the Shapiro case be held in abeyance for the determination of the cases already pending before the Supreme Court. No order was entered with respect to this petition. On May 19, 1971, a motion to strike was filed in behalf of the defendant county officers. On May 28, 1971, an order was entered, by a judge other than the judge who heard the Lake Shore case, finding that the action was properly maintained as a class action and that each plaintiff had standing to bring the action in its own behalf and was a proper representative of the class

he purported to represent. The order found that article IX-A "is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families." Except as to the plaintiff Clemens K. Shapiro and members of his class, the complaint was dismissed. All of the plaintiffs in the Shapiro case have appealed from this judgment.

[1] The plaintiffs in the Maynard and Shapiro cases justify the institution of their actions upon the ground that there are deficiencies as to parties and as to legal propositions in the Lake Shore case which might, without the assistance which they volunteer to supply, preclude the possibility of full consideration of the issues by this court. That it is not necessary that each person or group of persons favorably or unfavorably affected by a legislative classification be made parties to an action challenging the validity of that classification is apparent. Major cases involving discrimination of the sort here alleged have not required the presence, as parties, either in person or by representative, of all those affected. See *e. g.*, *Lawrence v. State Tax Comm. of State of Mississippi* (1932), 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102.

There are no factual issues in the present cases, and the order of this court which consolidated the Lake Shore and Maynard cases provided: "Counsel may brief and argue all issues as to the validity and effect of the constitutional amendment known as Article IX-A of the Constitution of 1870." (See *Hux v. Raben* (1967), 38 Ill. 2d 223, 230 N.E. 2d 831.) Additional class actions were not necessary to place before the court all pertinent

legal theories. We shall, however, consider the arguments advanced by counsel in those cases.

Neither the plaintiffs in the Maynard case nor those in the Shapiro case are content with the interpretation of article IX-A arrived at by Judge Walter P. Dahl in the Lake Shore case. That interpretation was that the new Article "purports to prohibit the taxation of personal property by valuation as to 'individuals', and only as to 'individuals', while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois . . . which imposed such personal property taxes as to property owned by corporations and other 'non-individuals.'"

One alternative construction, advanced by the plaintiffs in the Shapiro case, is that the "Illinois' Constitution of 1870, as amended by the addition of Article IX-A, specifically prohibits, and declares to be unconstitutional the imposition in Illinois of the property taxes imposed by Article IX, Section 1, on all forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner." This construction is achieved by disregarding the fact that article IX-A is clearly concerned only with the taxation of personal property, and by concentrating upon the fact that the last sentence in the official explanation which appeared upon the ballot at the election of November 3, 1970, when article IX-A was approved, mentioned taxes upon both real and personal property. That explanation was as follows:

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not effect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this re-

sult by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

The last sentence of the explanation, however, is not a part of the amendment, and its reference to real property taxes was made in describing the existing provisions of article IX, section 1, which are modified by article IX-A.

Based upon the circumstance that the phrase "as to individuals" is printed in italics in article IX-A, the Maynard plaintiffs turn to materials other than the legislative explanations in a search for a technical meaning. They say: "The unusual circumstance that the words 'as to individuals' are italicized in the constitutional amendment, an unprecedented practice in constitutional drafting, strongly suggests that the General Assembly, in drafting Senate Joint Resolution No. 30 used the word 'individuals' as one having established technical significance and usage in the classification of taxpayers upon whom personal property taxes have been imposed."

They purport to find the technical meaning that they seek in the circumstance that two different forms, administratively prescribed, have been used for personal property tax returns. One form is to be used by "individuals, partnerships, and unincorporated associations owning or controlling personal property used in agriculture, and all individuals owning or controlling any personal property which is not owned or used in connection with any business (other than agriculture) * * *." The other form is to be used by "[p]roprietorships, partnerships and unincorporated associates engaged in business (other

than agriculture) * * *." On the assumption that the word "individuals" was intended to have an established technical meaning because it was printed in italics, the Maynard plaintiffs, and the Shapiro plaintiffs as well, argue that the word "individuals" was used to denote a class of natural persons owning personal property not used in business.

There is, however, a more prosaic explanation for the fact that the words "as to individuals" are printed in italics. When Senate Joint Resolution No. 30 was originally introduced on April 29, 1969, the proposed article IX-A read as follows: "Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited." (Senate Journal, April 29, 1969, p. 1038.) On May 15, 1969, Senate Joint Resolution No. 30 was amended "by striking the period and adding the following: 'as to individuals.'" Senate Journal, May 15, 1969, pp. 1407-8.

The added words were placed in italics in accordance with routine legislative practice, which contemplates that in the case of amendments, new material is to be italicized. The rules of the Senate of the 76th General Assembly provided: "All resolutions originated in the Senate proposing amendments to the Constitution shall be ordered printed and shall be printed in the same manner in which bills are printed." (Senate Journal, Feb. 18, 1969, p. 163.) And as to bills, they provided: "Senate Bills and House Bills in the Senate shall be printed with new matter in italics and omitted or superseded matter enclosed in brackets and underlined." Senate Journal, Feb. 18, 1969, p. 161.

There is thus no underpinning for the argument that the General Assembly intended that the word "individuals" should be given an artificial meaning. The official

explanations, which are not discussed in the Maynard brief, definitely negative such an intention. We have examined the other materials to which the Maynard and Shapiro plaintiffs have referred, but have found nothing which persuades us that the words of article IX-A should be given anything other than their natural meaning.

We conclude that the meaning of article IX-A is that *ad valorem* taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited.

The Maynard case plaintiffs and all of the Shapiro case plaintiffs, with the exception of Shapiro, contend that article IX-A, so construed, violates the equal protection clause of the fourteenth amendment to the constitution of the United States. Lake Shore contends that it is the Revenue Act, which must be regarded as amended by article IX-A, rather than the article itself, which violates the equal-protection clause. We shall first consider the basic question of the validity of the discrimination effected by article IX-A.

The new article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed. Of course the equal-protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the States in drawing the lines between classes. Nevertheless, a State may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated.

The Supreme Court of the United States has thus described the governing principles:

"Of course, the State, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. *Bell's Gap R. Co. v. Commonwealth of Pennsylvania*, 134 U.S. 232, 237, 10 S. Ct. 533, 535, 33 L. Ed. 892; *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 293, 18 S. Ct. 594, 598, 42 L. Ed. 1037; * * * *State Board of Tax Com'rs of Indiana v. Jackson*, 283 U.S. 527, 537, 51 S. Ct. 540, 543, 75 L. Ed. 1248. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co. v. Conway*, *supra*, 281 U.S., [146], at 159, 50 S. Ct. [310], at page 314 [74 L. Ed. 775].

"But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' *F. S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 561, 64 L. Ed. 989; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37, 48 S. Ct.

423, 425, 72 L. Ed. 770; *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 85, 45 S. Ct. 12, 15, 69 L. Ed. 169; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240, 46 S. Ct. 260, 261, 70 L. Ed. 557; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160, 50 S. Ct. 310, 314, 74 L. Ed. 775 * * *."

Allied Stores of Ohio, Inc. v. Bowers (1959), 358 U.S. 522, 526-527, 79 S. Ct. 437, 440, 3 L. Ed. 2d 480, 484-485.

When classifications are reasonable, it is because of differences in the nature of the property or in the use to which it is put. The nature of the tax is important, too, for what may be a reasonable classification for a license, or a privilege tax, is not necessarily a reasonable classification for a property tax.

Mr. Justice Brandeis stated the criterion this way in his dissenting opinion in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406, 48 S. Ct. 553, 556, 72 L. Ed. 927, 932: "In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike, that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state, and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible."

Article IX-A must be read against the scheme of property taxation established pursuant to article IX of the

constitution of 1870, which, with respect to property taxes, contemplates the levy of "a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." (Const. of 1870, art. IX, Sec. 1.) Taxes levied by municipal corporations are required to be "uniform in respect to persons and property, within the jurisdiction of the body imposing the same." (Const. of 1870, art. IX, sec 9.) The permissible exemptions from taxation are thus described: "The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law * * *." Const. of 1870, art. IX, sec. 3.

Against this background the incongruity of the prohibition contained in article IX-A is apparent. It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others. For the purpose of a tax by valuation upon the ownership of real or personal property, the identity of the owner is a neutral consideration, as is his status as sole proprietor, joint tenant, tenant in common, partner (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 25), limited partnership (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 61), member of a professional service corporation (Ill. Rev. Stat. 1969, ch. 32, par. 415-1 et seq.), or of a professional association (Ill. Rev. Stat.

1969, ch. 106½, par. 101 et seq.; see Sup. Ct. Rule 721, Ill. Rev. Stat. 1969, ch. 110A, § 721; 43 Ill. 2d R. 721).

[2] We hold, therefore, that the discrimination produced by article IX-A violates the equal-protection clause of the fourteenth amendment. Apart from that discrimination, the validity of the Revenue Act is not challenged, and we hold that it is article IX-A which must fall. The validity of article IX of the constitution and of the Revenue Act are therefore not affected.

The judgment of the circuit court of Cook County in No. 44199 (Lake Shore) is reversed, and the cause is remanded to that court with directions to dismiss the complaint. Insofar as the judgment of the circuit court in No. 44432 (Shapiro) dismissed the complaint as to all of the plaintiffs other than Clemens K. Shapiro, it is affirmed; insofar as that judgment sustained the complaint as to Clemens K. Shapiro, it is reversed and the cause is remanded to that court with directions to dismiss the complaint. In No. 44308 (Maynard), the complaint is dismissed.

No. 44199. Reversed and remanded with directions.

No. 44308. Complaint dismissed.

No. 44432. Affirmed in part; reversed in part and remanded, with directions.

DAVIS, Justice (dissenting).

The majority opinion holds that our State constitution of 1870, as modified by article IX-A, may not validly classify exemptions from ad valorem personal property taxation on the basis of the ownership of the property, and that such exemption may be made only upon a classification based upon the nature of the property or its use. I dissent from this pronouncement.

It is clear that the United States Constitution imposes no particular modes of taxation upon the states and leaves them unrestricted in their power to tax those domiciled within their borders so long as the tax imposed is upon property within the State, or on privileges enjoyed there, and so long as the tax is not so palpably arbitrary or unreasonable as to infringe upon the equal protection and due process requirements of the fourteenth amendment. *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 280, 52 S. Ct. 556, 557, 76 L. Ed. 1102, 1105.

The majority opinion recognizes that "the equal-protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the states in drawing the lines between classes"; and that, "nevertheless, a state may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated." This general rule is found in the quotation from *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480, cited by the majority. The rule has been expressed and exemplified many times in varying terms. Examples are: "Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action." (*Welch v. Henry*, 305 U.S. 134, 144, 59 S. Ct. 121, 124, 83 L. Ed 87, 92); "It is a salutary principle of judicial decision, * * * that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and ex-

perience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." (*Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584, 55 S. Ct. 538, 540, 79 L. Ed. 1070, 1073); due process imposes no rigid rule of equality in taxation, and irregularities resulting from singling out one particular class for taxation or exemption infringe no constitutional requirement. (*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S. Ct. 868, 872, 81 L. Ed. 1245, 1253); and it is only the invidious discrimination or classification which is patently arbitrary and utterly lacking in rational justification which is barred by the due process or equal protection clauses. *Flemming v. Nestor*, 363 U.S. 603, 611, 612, 80 S. Ct. 1367, 1373, 4 L. Ed. 2d 1435, 1445.

The variety of ways of expressing the rule that a legislative classification for taxation purposes is not violative of the fourteenth amendment if it has a reasonable relation to the subject of the particular legislation so that all persons similarly situated are treated alike, and pertinent citations, are found in 16A C.J.S. Constitutional Law, §§ 520, 521, 649.

In this litigation, as is often the case, the particular expression of the rule which the majority of the court chooses to rely upon may be dictated by the outcome which the judges of the majority think to be proper. Beyond doubt, the fourteenth amendment does not impose on the states an inflexible and technical rule of equal taxation, and the extent to which the States may go in devising a legislative classification for taxation is illustrated by the statement of the Supreme Court in *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 284, 285, 52 S. Ct. 556, 559, 76 L. Ed. 1102, 1108:

"The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions."

The Supreme Court in *Lawrence* also stated that there is no constitutional requirement that a system of taxation should be uniform as applied to individuals and corporations, regardless of the circumstances in which it operates (286 U.S. 276, 283, 52 S. Ct. 556, 558, 76 L. Ed. 1102, 1107), and we have just recently held that for the purpose of income taxation, corporations may be placed in one class and individuals in another and each taxed differently. (*Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E. 2d 633.) The language of the court at pages 45 and 46, at page 638 of 250 N.E. 2d is worthy of repetition:

"It is next contended that the Act violates the uniformity provision of section 1 of article IX of our constitution and the equal-protection and due-process requirements of the fourteenth amendment to the United States constitution by creating multiple classes and discriminating unreasonably among them. This contention is advanced specifically against the provisions which tax corporations at a 4% rate and individuals, trusts, and estates at 2½% rate.

"Both the equal protection argument and the uniformity argument depend on the reasonableness of putting corporations in one class and individuals, trusts, and estates in another class for purposes of this tax. (See *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289, 247 N.E. 2d 606.) When the due-process contention has been advanced, this court, citing Supreme Court cases, has stated: 'It has long been settled that the power of the legislature to make classifications,

particularly in the field of taxation, is very broad, and that the fourteenth amendment imposes no "iron rule" of equal taxation. [Citations.] The reasons justifying the classification, moreover, need not appear on the face of the statute, and the classification must be upheld if any state of facts reasonably can be conceived that would sustain it. [Citations.] The burden therefore rests on one who assails the statute to negate the existence of such facts. [Citations.] *Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 489-490, 119 N.E. 2d 215.

When the uniformity contention has been advanced this court has stated: 'It is well established that the legislature has broad powers to establish reasonable classifications in defining subjects of taxation. * * * Such classification must, however, be based on real and substantial differences between persons taxed and those not taxed. [Citations.]' (*Klein v. Hulman*, 34 Ill. 2d 343, 346-347, 215 N.E. 2d 268, 270.) 'In order to prevail on an allegation that a statute or portion of a statute is unconstitutional, the plaintiff has the burden of showing how the legislature has violated the constitution.' *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289, 291, 247 N.E. 2d 606, 608.

"In short, petitioners have the burden of showing that the challenged classification is unreasonable. Their only assertion is that 'corporations are at a disadvantage when they compete in the same type of business with individual proprietorships or partnerships because of the rate differential.' This assertion has been rejected by the Supreme Court as to a Federal tax (*Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed. 389), and as to a State tax (*Fort Smith Lumber Co. v. Arkansas ex rel. Arbuckle*, 251 U.S. 352, 40 S. Ct. 304, 64 L. Ed. 396), and by this court (*People v. Franklin National Insurance Co. of New York*, 343 Ill. 336, 175 N.E. 431; *Michigan Millers' Mutual Fire Insurance Co. v. McDonough*, 358 Ill. 575, 193 N.E. 662), where, for pur-

poses of the tax in question, corporations were placed in one class and individuals in another and each were taxed differently."

The majority, however, holds that as to a property tax the classification for exemption or taxation may not be based upon the character of the ownership, but only upon the nature of the property itself. Thus, the majority is of the opinion that the classification may not be based upon the corporation—individual distinctions which we upheld in *Thorpe*.

In *Thorpe* this court reversed its prior holding that income is property (*Bachrach v. Nelson*, 349 Ill. 579, 182 N.E. 909), and held that an income tax was not a property tax. The significance of this determination was that section 1 of article IX of our Constitution of 1870) required the levying of a tax "by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." At the same time, the constitutional provisions permitted a tax upon franchises and privileges in such manner as the legislature might direct, so long as it was uniform as to each "class." Obviously, the legislature could not, under the foregoing provisions, impose an income tax upon corporations at one rate and upon individuals at a lesser rate if it were a tax on property. Our constitution then prohibited any tax on property unless structured to be uniform as to valuation.

After reaching the conclusion that an income tax was not a property tax, the court faced no barrier in upholding the Illinois Income Tax Act. In the case at bar, after article IX-A amendment to the constitution of 1870 was adopted, the uniformity provisions of section 1 of article IX were no longer effective as to the taxation of per-

sonal property of individuals, and the court should have found no impediment to upholding the validity of article IX-A and the abolishment of this tax as to individuals.

Constitutional provisions requiring property to be taxed uniformly in proportion to its value are not uncommon to the state. In the California Railroad Tax cases (*San Mateo County v. Southern Pacific R. Co.*, C.C., 13 F. 722, appeal dismissed per stipulation, 116 U.S. 138, 6 S.Ct. 317, 29 L. Ed. 589; *Santa Clara County v. Southern Pacific R. Co.*, C.C., 18 F. 385, aff'd other grounds, 118 U.S. 394, 6 St.Ct. 1132, 30 L. Ed. 118), which held that unequal taxation, based upon the character of the owner, was forbidden by the fourteenth amendment, a constitutional provision requiring uniformity of taxation was involved. Even though the California constitution specified that all property be taxed in proportion to its value, laws of the State especially provided that as to railroad properties only, the amount of a mortgage on the real estate was not to be deducted in ascertaining the value of the real estate for taxation purposes. The trial court quite properly held that this method of valuation, as to railroads only, was improper under the circumstances, and the United States Supreme Court affirmed the lower court on a nonconstitutional basis without reaching the constitutional question. The California railroad tax cases should be read, with cognizance, that the State constitution required all property to be taxed in proportion to its value, and that the cases arose at a time when it was necessary to establish that the word, "persons" as used in the fourteenth amendment, included corporations. Apparently, the latter point had a strong bearing on the expressions found in these cases.

In the case at bar, by virtue of the adoption of article IX-A, there is no constitutional requirement that taxes

on personal property be uniform as to individuals and corporations so that each pays a tax in proportion to the value of his or its property. Article IX-A, which we are called upon to consider, eliminated this requirement; it provides that "the taxation of personal property is prohibited as to individuals." Thus, the case at bar is a far cry from one in which the legislature is attempting to discriminate between individuals and corporations in the face of a constitutional provision prohibiting such discrimination. Here the question for determination is whether, absent the requirement of a State constitution that corporate and individual personal properties be taxed the same, the equal protection clause of the fourteenth amendment permits them to be taxed differently. I believe that it does!

Without the constitutional requirement of uniformity on the taxation of properties, there is no reason or justification in the case at bar for stating that personal property taxation may not be classified on the basis of ownership of the property. The constitution of 1870, as amended by article IX-A, does not so provide, and the constitution of 1970 suggests the contrary. Article IX of the constitution of 1970 relates to revenue, and section 5 thereof pertains to personal property taxation. Subsection (a) thereof provides that the legislature "may classify personal property for purpose of taxation by valuation, abolish such taxes on any or all *classes* and authorize the levy of taxes in lieu of the taxation of personal property by valuation." (Emphasis ours.) Without more, it could be said that the word, "classes" refers only to classes of property, but subsection (c) refers to the abolition of all *ad valorem* personal property taxes by January 1, 1979, and the replacement of the lost rev-

enue, and provides: "Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those *classes* relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971." (Emphasis ours.) Obviously, the word, "classes" as there used, does not refer to classes of property; it refers to classes of property owners and provides for taxation according to the character of the owner. If the majority opinion is to stand and article IX-A held to be unconstitutional, then under consistent application of its rationale, subsection (a) of section 5 of the new constitution is likewise unconstitutional.

The majority opinion chose to rely upon the rationale of *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 48 S.Ct. 553, 72 L. Ed. 927. I believe that the elucidation and logic of the dissent of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, offers the better reason. Therein, Mr. Justice Brandeis made some observations which are particularly apropos here. The court had under consideration a tax on the gross receipts of corporate taxicab companies where no similar tax was imposed upon the receipts of individuals who operated taxicabs. The majority held that the classification was based solely upon the character of the owner, and that it violated the fourteenth amendment.

In his dissenting opinion, 277 U.S. 389, 403-412, 48 S.Ct. 553, 555-558, 72 L. Ed. 927, 931-934, Mr. Justice Brandeis observed that the tax applied equally to all corporations, foreign and domestic. He stated that the fundamental question before the court was:

"Does the equality clause prevent a state from imposing a heavier burden of taxation upon corpora-

tions engaged exclusively in intrastate commerce, than upon individuals engaged under like circumstances in the same kind of business? The narrower question presented is whether this heavier burden may be imposed by a form of tax 'not peculiarly applicable to corporations'; that is, by a tax of such a character that it might have been extended to individuals if the Legislature had seen fit to do so."

He then pointed out that the difference between a business carried on in corporate form and one carried on by natural persons is "a real and important one." He observed that the discrimination was not based upon any difference in the source of income or in the character of the property employed, and stated the obvious: that the requirement that a classification must be reasonable does not imply that the policy embodied in the classification must be deemed by the court to be a wise one. He concluded that a state is permitted to impose upon corporations more than their pro rata share of the burden of taxation, and that nothing in the Federal constitution prohibits this.

It seems that this is exactly what we held in *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E. 2d 633. We recognized what we called the obvious advantages of carrying on a business in the corporate form. The privilege of carrying on a business in this form has many advantages: the corporate ownership of property, freedom from personal liability for corporate obligations, continuity of existence, etc. There we acknowledged that there are sufficient differences between the privilege of earning or receiving income as a corporate entity and that of earning or receiving income as an individual, to justify the variance in tax rates between the individual and the corporation, and here we should recognize that there are sufficient

differences between the privilege of owning property as a corporate entity and the privilege of owning it as an individual to justify the exemption in the case of the individual property owner. The fact that the corporation may in some respects be placed at a disadvantage in its competition with individuals owning similar property and engaged in the same business should not condemn the classification as unreasonable. *Thorpe v. Mahin*, at p. 46, 250 N.E. 2d 633.

There is no more compelling reason to suggest that the classifications for personal property tax purposes must be based upon the nature of the property than there is to suggest that the classifications for income tax purposes must be based on the source or type of income to be reported. The article IX-A constitutional amendment creates a classification based upon the distinctions inherent between corporations and individuals—a distinction which we have recognized and upheld as valid under the equal protection clause requirement of the fourteenth amendment in *Thorpe v. Mahin*.

Another matter is worthy of mention in our consideration of this case. The evils and the inequities in the administration of the personal tax collections in this State are known to everyone. That these inequities apply with equal force to corporate taxpayers and individual taxpayers may, or may not, be totally true. The desire and purpose of systematically eliminating this archaic form of taxation are apparent from the actions of the people and the legislature of the State. The General Assembly, which drafted and adopted Senate Joint Resolution No. 30, had previously at the same legislative session already exempted from such taxation, household furniture and one automobile, per household, if used for personal plea-

sure. (Ill. Rev. Stat. 1969, ch. 120, para. 500.21a.) The article IX-A amendment was overwhelmingly ratified by the people of the State. The constitution of 1970, likewise adopted by the vote of the people, expressed concern over the form and use of personal property taxation. The newly-adopted constitution prohibits the reinstatement of any *ad valorem* personal property tax abolished before January 1, 1971, the effective date of the new constitution. This provision refers to the personal property tax as to individuals which was abolished by article IX-A, and the majority opinion runs counter to this constitutional prohibition in that it reinstates the personal property tax as to individuals. In addition, the new constitution provides that all *ad valorem* personal property taxes shall be abolished on or before January 1, 1979.

The obvious spirit of the article IX-A amendment, the will of the people, as expressed by its adoption, and the intent and purpose of the legislature, should not be thwarted unless a construction to this effect is required. Thus, it is very appropriate that we consider the mischief sought to be remedied and the purpose to be accomplished by the article IX-A amendment. (Wolfson v. Avery, 6 Ill. 2d 78, 88, 126 N.E. 2d 701.) Likewise, the court should memorialize the salutary rule of law that an amendment to a State constitution should be deemed violative of the Federal constitution only where the asserted constitutional rights cannot otherwise be protected and effectuated. Reynolds v. Sims, 377 U.S. 533, 584, 84 S.Ct. 1362, 1393, 12 L.Ed 2d 506, 540.

After considering the background of this constitutional amendment and the purpose which it, along with the other contemporary legislative enactments and constitutional adoptions, seeks to accomplish, I believe that the classi-

fication found in the article IX-A amendment does not constitute an invidious discrimination; that it seeks to accomplish and promote a valid policy expressive of the will of the people and the intent and purpose of the legislature; and that the distinction upon which the classification for exemption is based does not overstep the limitations imposed by the fourteenth amendment.

STATE OF ILLINOIS }
COUNTY OF COOK } SS

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT,
CHANCERY DIVISION

LAKE SHORE AUTO PARTS
CO., an Illinois corporation, on its
own behalf and also as representa-
tive of a class of corporations and
other "non-individuals", which
class is herein described,

Plaintiffs,

vs.

BERNARD J. KORZEN, County
Treasurer and ex-officio County
Collector of Cook County, GEOR-
GE E. KEANE and HARRY S.
SEMROW, Members of the Board
of Appeals of Cook County, P. J.
CULLERTON, County Assessor of
Cook County, EDWARD J. BAR-
RETT, County Clerk of Cook
County, and ROBERT J. LEN-
HAUSEN, Director, Department of
Local Government Affairs of the
State of Illinois.

NO. 70 CH 5123

ORDER

This cause coming on to be heard upon the Motion For
Summary Judgment of LAKE SHORE AUTO PARTS
CO., an Illinois corporation, plaintiff, by and through

its attorneys, ORLIKOFF, PRINS, FLAMM & SUSMAN, and upon the Cross-motion For Summary Judgment of defendant ROBERT J. LENHAUSEN, Director, Department of Local Government Affairs of the State of Illinois, by and through the Attorney General of Illinois, and the Cross-motion For Summary Judgment of defendants KORZEN, KEANE, SEMROW, CULLERTON and BARRETT, assessing and taxing officials of Cook County, by and through the State's Attorney of Cook County.

The Court having examined the pleadings and memoranda filed by the parties hereto, having heard the arguments of counsel and being fully advised in the premises

DOES HEREBY FIND:

1. That there is no genuine issue as to any material fact in this cause, and it is therefore appropriate and proper that the cause be determined on the Motion and Cross-motions For Summary Judgment.

2. That the plaintiff, LAKE SHORE AUTO PARTS CO., is a corporation duly organized and existing under the laws of Illinois, and on April 1, 1970, was the owner of personal property having a taxable situs in the County of Cook, which property has been included on the assessment role now being prepared by the assessing officials of Cook County for the tax year 1970; that the plaintiff has standing to bring this action on its own behalf, and it is not at this time necessary or appropriate to determine whether the action is properly brought and maintained as a class action or to determine the definition of the plaintiff class.

3. That an amendment to the Illinois Constitution of 1870, designated as Article IX-A, was approved by the

people of Illinois at a referendum held on November 7, 1970, and such amendment, by its terms, became effective January 1, 1971; that said Article IX-A purports to prohibit the taxation of personal property by valuation as to "individuals", and only as to "individuals", while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, § 482 et seq.) which impose such personal property taxes as to property owned by corporations and other "non-individuals".

4. That said Article IX-A is self-executing, and the necessary effect of the adoption thereof is to amend the various provisions of the Revenue Act of Illinois, specifically including but not limited to §18 thereof (Ill. Rev. Stat. 1969, ch. 120, §499), so as to exempt from personal property taxes thereby imposed all personal property owned by "individuals", while retaining such taxes as to personal property owned by corporations and other "non-individuals."

5. That the Revenue Act of Illinois, as so amended by Article IX-A of the Illinois Constitution, deprives the plaintiff corporation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States; that said Revenue Act of Illinois, to the extent that it purports to impose personal property taxes with respect to the property owned by plaintiff, is therefore unconstitutional, void and of no effect whatsoever.

6. That Article IX-A of the Illinois Constitution is not applicable with respect to personal property taxes imposed by the Revenue Act of Illinois for the year 1970, the assessment date for which was April 1, 1970, and the assessment of which had been commenced prior to Janu-

ary 1, 1971, the effective date of Article IX-A, notwithstanding that such assessment had not been completed as of that date:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

7. The plaintiff's Motion For Summary Judgment is granted in part and denied in part, the Court declaring that the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, §§ 482 et seq.), said Revenue Act having been amended by Article IX-A of the Illinois Constitution, is violative of the Fourteenth Amendment to the Constitution of the United States and is held to be void and unenforceable insofar as said Revenue Act purports to impose personal property taxes on plaintiff.

8. The defendants' Cross-motions For Summary Judgment are granted in part and are denied in part, the Court declared that Article IX-A of the Illinois Constitution is not applicable to, and does not impair the collection of, personal property taxes imposed by the Revenue Act of Illinois, the assessment of which were commenced prior to January 1, 1971.

9. Except for those matters adjudicated by paragraphs 7 and 8 of this Order, this Court retains jurisdiction of this cause for all purposes.

10. Pursuant to Rule 304(a) of the Rules of the Supreme Court of Illinois, the Court expressly finds that there is no just reason for delaying enforcement or appeal of this Order. In the event of an appeal from this Order, the Court is of the opinion that the interests of justice would be best served by hearing and deciding the appeal as expeditiously as possible because of the

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manifest public importance of the issues and the substantial amount of tax revenues that are involved.

DATED: _____, 1971.

ENTER: -

Judge, Circuit Court of Cook
County, Illinois.

STATE OF ILLINOIS }
COUNTY OF COOK } SS

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT,

TAX DIVISION

CLEMENS K. SHAPIRO, JEROME HERMAN, d/b/a THE SPOT, GUY S. ROSS AND EUGENE D. ROSS, d/b/a GUY S. ROSS & CO., a partnership; and M. WEIL AND SONS, INC., an Illinois Corporation, all individually and in representative capacity,

Plaintiffs,

vs.

EDWARD J. BARRETT, County Clerk of Cook County; BERNARD J. KORZEN, County Treasurer and ex-officio County Collector of Cook County; GEORGE E. KEANE and HARRY H. SEMROW, Members of the Board of Appeals of Cook County; P. J. CULLERTON, County Assessor of Cook County, and ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois,

Defendants.

No. 71 L 5745

ORDER

This cause appears before this Court on plaintiffs' Complaint for Declaratory Judgment, filed pursuant to Chapter 110, Section 57.1 of the Civil Practice Act. The action was filed by plaintiffs for themselves and in a representative capacity on behalf of all other persons similarly situated. The cause comes on for hearing on separate motions, to strike and dismiss that complaint, filed by County and State defendants. Defendants have elected to stand on their motions.

No genuine issue as to any material fact emerges.

The plaintiffs are:

1. Clemens K. Shapiro, is a natural person, citizen and taxpayer of the State of Illinois, resident of and a salaried employee in the County of Cook wherein he owns personal property in his own name, and owns real property jointly with his wife, none of which property is owned or used in the operation of, or for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family.

2. Jerome Herman, is a natural person, and a citizen of the State of Illinois, and as sole proprietor owns, operates and conducts a business located in Cook County, Illinois, and is the owner of property and a taxpayer herein.

3. Guy S. Ross and Eugene D. Ross, natural persons, citizens and residents of the State of Illinois, both of whom are partners, and as partners operate and conduct a business as a partnership duly organized under the laws of the State of Illinois, which business entity is located in the County of Cook and is the owner of property and a taxpayer therein.

4. M. Weil and Sons, Inc., a corporation duly organized and existing under the laws of the State

of Illinois, is located in, and is the owner of property situated in the County of Cook and a taxpayer therein.

Each of the plaintiffs is an owner of property subject to the ad valorem tax directed to be imposed by Article IX of the Illinois Constitution of 1870, and imposed by the Illinois Revenue Act of 1939, which property has been assessed by valuation and continues to be so assessed by defendants pursuant to that constitutional and statutory authority.

The electorate of this State, on November 3, 1970, adopted amending Article IXA to the Illinois Constitution of 1870. This amendment became part of the Illinois Constitution on November 25, 1970, and reads as follows:

"Article IX-A

TAXATION OF PROPERTY

"§ 1. Taxation of personal property prohibited. Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*"

"SCHEDULE

"Paragraph 1. This amendment shall become effective January 1, 1971."

Plaintiffs contend as follows:

All plaintiffs contend that Illinois Constitution of 1870, as amended by the addition of Article IXA, specifically prohibits, and declares to be unconstitutional the imposition, in Illinois, of the property taxes imposed by Article IX, Section 1, on *all* forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner.

All plaintiffs contend that if Article IXA does not prohibit the taxation of all property, then Article IXA prohibits the tax to be measured by the value of the property taxed.

All plaintiffs contend that the prohibition of Article IXA, which abolishes the imposition of property tax measured by valuation of the property taxes, extends to those taxes so measured where the assessment of plaintiffs' property has been commenced by defendants prior to, even though not completed on January 1, 1971, the effective date of Article IXA, and payment due thereafter.

Natural Persons contend that:

The designation "individuals" in Article IXA properly and validly describes, is intended to apply, and does apply solely to them; and the taxation by valuation prohibited in Article IXA, if not applicable to all property owned by them, is applicable to personal property owned by them and used by them for their personal purposes; and that,

Article IXA prohibits taxation, by valuation of personal property as to them alone, while denying that prohibition as to all others, is proper, valid, and constitutional under both Illinois Constitution and the Constitution of the United States.

Both business entities and corporations contend that:

Article IXA, effective January 1, 1971, as an amendment to Illinois Constitution of 1870 is offensive to the Constitution of the United States.

If the designation "individuals" in Article IXA invokes prohibition of taxes by valuation on personal property exclusively as to "natural persons" and personal

property owned by them, but denies the same prohibition to business entities and corporations, then such classification is discriminatory, unreasonable and offensive both to Illinois Constitution and the Constitution of the United States. This is true for the reasons that such classification is invalidly predicated upon purported differences between *users* of identical property and the *use* to which that property is put, instead of differences found to exist between the forms of the property upon which that tax is directly laid. The employment of such base constitutes special legislation prohibited by Article IV, Section 22 of Illinois Constitution, as well as denying to business entities and corporations due process of law and the equal protection of the law guaranteed to them by Article II, Section 2 of the Illinois Constitution, and the Fourteenth Amendment to the Constitution of the United States.

Unless the exclusion of property owned by "individuals" is construed to exclude the property of business entities and corporations, as well as that of natural persons, then the employment in Article IXA of the term "individuals" is so vague, uncertain, and incapable of definitive application to the context of Article IX, that Article IXA must fall because it is totally absent the comprehension required, especially of constitutional provisions, by both Illinois Constitution and the Constitution of the United States.

Business entities contend that:

(a) The designation "individuals" in Article IXA correctly and properly described, and is intended to apply to, and does include business entities which own property because the natural person owners of that business entity are personally and individually liable for the payment of that tax.

Article IX-A prohibiting taxation by valuation of property owned by such business entities, while denying that prohibition as to corporations is proper, valid and constitutional under both Illinois' Constitution and the Constitution of the United States.

Corporations contend that:

If the designation "individuals" in Article IX-A applies to any or all owners of property except corporate owners of property, then such classification is discriminatory, unreasonable, and offensive to both the Illinois' Constitution and the Constitution of the United States.

Defendants contend that the taxation by valuation of real property and other property, as provided in Article IX shall continue and remain, in all regards, unaffected by Article IX-A. however:

Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited only as to natural persons; but as to them, only as to the personal property owned by them; but as to that personal property owned by them, only such of that property which is used by them for the personal judgment of themselves and their families.

This matter appearing on the pleadings aforesaid, presenting the issues to this Court as delineated by those pleadings, and the Court having heard argument by all parties in support of their respective positions, THIS COURT FINDS:

1. That a genuine cause and controversy exists, and that this action is properly maintained under the provisions of Chapter 110, Section 57.1 (Declaratory Judgments), Civil Practice Act, Illinois Revised Statutes, 1969.
2. Each of these plaintiffs has standing to bring this

action in his or its own behalf and is a proper representative of his class.

3. That this action is properly maintained as a class action, and the members of those classes are adequately and competently represented by counsel herein.

4. That Article IX-A of the Illinois Constitution of 1870 is valid, constitutional and immune to all of the plaintiffs' assaults, both under the Illinois Constitution and the Constitution of the United States.

5. That Article IX-A is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families.

6. That these findings by this Court make it unnecessary to consider contentions made by plaintiffs in the alternative.

7. That all issues as found heretofore are found in favor of the defendants, except as to those issues relating to the plaintiff Clemens K. Shapiro and members of this class involving personal property owned and used by them for the personal enjoyment of themselves and their families.

8. That motions to strike and dismiss plaintiffs' Complaint are sustained in regards and in respect of those found in favor of the defendants, except as to those issues raised by plaintiff Clemens K. Shapiro and members of his class involving personal property owned and used by them for the personal enjoyment of themselves and their families.

9. Pursuant to Rule 304(a) of the Rules of the Supreme Court of Illinois, the Court expressly finds that there is no just reason for delaying enforcement or appeal of this Order. In the event of an appeal from this Order, the Court is of the opinion that the interests of justice would be best served by hearing and deciding the appeal as expeditiously as possible because of the manifest public importance of the issues and the substantial amount of tax revenues that are involved.

WHEREFORE, IT IS ORDERED, ADJUDGED and DECREED that defendants' motions to strike and dismiss are sustained as to all plaintiffs, except the plaintiff Clemens K. Shapiro and members of his class, and plaintiffs' Complaint is stricken as to all issues and in all regards and respects contrary to and in variance with the judgment of this Court; that Amending Article IX-A of the Illinois Constitution is valid and constitutional in all respects and is immune to attack under any provision or provisions of the Illinois Constitution of 1870 and the United States Constitution, and that said Amending Article IX-A declares its prohibition exclusively as to any personal property tax on the personal property owned by individuals and used for their personal enjoyment and that of their families.

ENTER:

THOMAS C. DONOVAN,
Presiding Judge, Tax Division,
Circuit Court of Cook County,
Illinois.

Date: May 27, 1971.

STATE OF ILLINOIS)
) ss.
 COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY,
 ILLINOIS
 COUNTY DEPARTMENT, CHANCERY DIVISION

LAKE SHORE AUTO PARTS CO.,
 an Illinois corporation, on its own
 behalf and also as representative of
 a class of corporations and other
 "non-individuals," which class is
 herein described,

Plaintiffs

vs.

BERNARD J. KORZEN, County
 Treasurer and ex-officio County Col-
 lector of Cook County, GEORGE E
 KEANE and HARRY H. SEMROW
 Members of the Board of Appeals of
 Cook County, P. J. CULLERTON
 County Assessor of Cook County,
 EDWARD J. BARRETT, County
 Clerk of Cook County, and ROBERT
 J. LEHNHAUSEN, Director, De-
 partment of Local Government Af-
 fairs of the State of Illinois,

Defendants.

TO. 70 CH 5123

ORDER

This cause coming on to be heard upon the Motion For Summary Judgment of LAKE SHORE AUTO PARTS CO., an Illinois corporation, plaintiff, by and through its attorneys, ORLIKOFF, PRINS, FLAMM & SUSMAN, and upon the Cross-motion For Summary Judgment of defendant ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois, by and through the Attorney General of Illinois, and the Cross-motion For Summary Judgment of defendants KORZEN, KEANE, SEMROW, CULLERTON and BARRETT, assessing and taxing officials of Cook County, by and through the State's Attorney of Cook County.

The Court having examined the pleadings and memoranda filed by the parties hereto, having heard the arguments of counsel and being fully advised in the premises

DOES HEREBY FIND:

1. That there is no genuine issue as to any material fact in this cause, and it is therefore appropriate and proper that the cause be determined on the Motion and Cross-motions For Summary Judgment.

2. That the plaintiff, LAKE SHORE AUTO PARTS CO., is a corporation duly organized and existing under the laws of Illinois, and on April 1, 1970, was the owner of personal property having a taxable situs in the County of Cook, which property has been included on the assessment role now being prepared by the assessing officials of Cook County for the tax year 1970; that the plaintiff has standing to bring this action on its own behalf, and it is not at this time necessary or appropriate to determine whether the action is properly brought and maintained as a class action or to determine the definition of the plaintiff class.

3. That an amendment to the Illinois Constitution of 1870, designated as Article IX-A, was approved by the people of Illinois at a referendum held on November 7, 1970, and such amendment, by its terms, became effective January 1, 1971; that said Article IX-A purports to prohibit the taxation of personal property by valuation as to "individuals", and only as to "individuals", while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, § 482 et seq.) which impose such personal property taxes as to property owned by corporations and other "non-individuals".

4. That said Article IX-A is self-executing, and the necessary effect of the adoption thereof is to amend the various provisions of the Revenue Act of Illinois, specifically including but not limited to § 18 thereof (Ill. Rev. Stat. 1969, ch. 120, § 499), so as to exempt from personal property taxes thereby imposed all personal property owned by "individuals", while retaining such taxes as to personal property owned by corporations and other "non-individuals."

5. That the Revenue Act of Illinois, as so amended by Article IX-A of the Illinois Constitution, deprives the plaintiff corporation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States; that said Revenue Act of Illinois, to the extent that it purports to impose personal property taxes with respect to the property owned by plaintiff is therefore unconstitutional, void and of no effect whatsoever.

6. That Article IX-A of the Illinois Constitution is not applicable with respect to personal property taxes imposed by the Revenue Act of Illinois for the year 1970,

the assessment date for which was April 1, 1970, and the assessment of which had been commenced prior to January 1, 1971, the effective date of Article IX-A, notwithstanding that such assessment had not been completed as of that date.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

7. The plaintiff's Motion For Summary Judgment is granted in part and denied in part, the Court declaring that the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, §§ 482 et seq.), said Revenue Act having been amended by Article IX-A of the Illinois Constitution, is violative of the Fourteenth Amendment to the Constitution of the United States and is held to be void and unenforceable insofar as said Revenue Act purports to impose personal property taxes on plaintiff.

8. The defendants' Cross-motions For Summary Judgment are granted in part and are denied in part, the Court declaring that Article IX-A of the Illinois Constitution is not applicable to, and does not impair the collection of, personal property taxes imposed by the Revenue Act of Illinois, the assessment of which were commenced prior to January 1, 1971.

9. Except for those matters adjudicated by paragraphs 7 and 8 of this Order, this Court retains jurisdiction of this cause for all purposes.

10. Pursuant to Rule 304(a) of the Rules of the Supreme Court of Illinois, the Court expressly finds that there is no just reason for delaying enforcement or appeal of this Order. In the event of an appeal from this Order, the Court is of the opinion that the interests of justice would be best served by hearing and deciding the

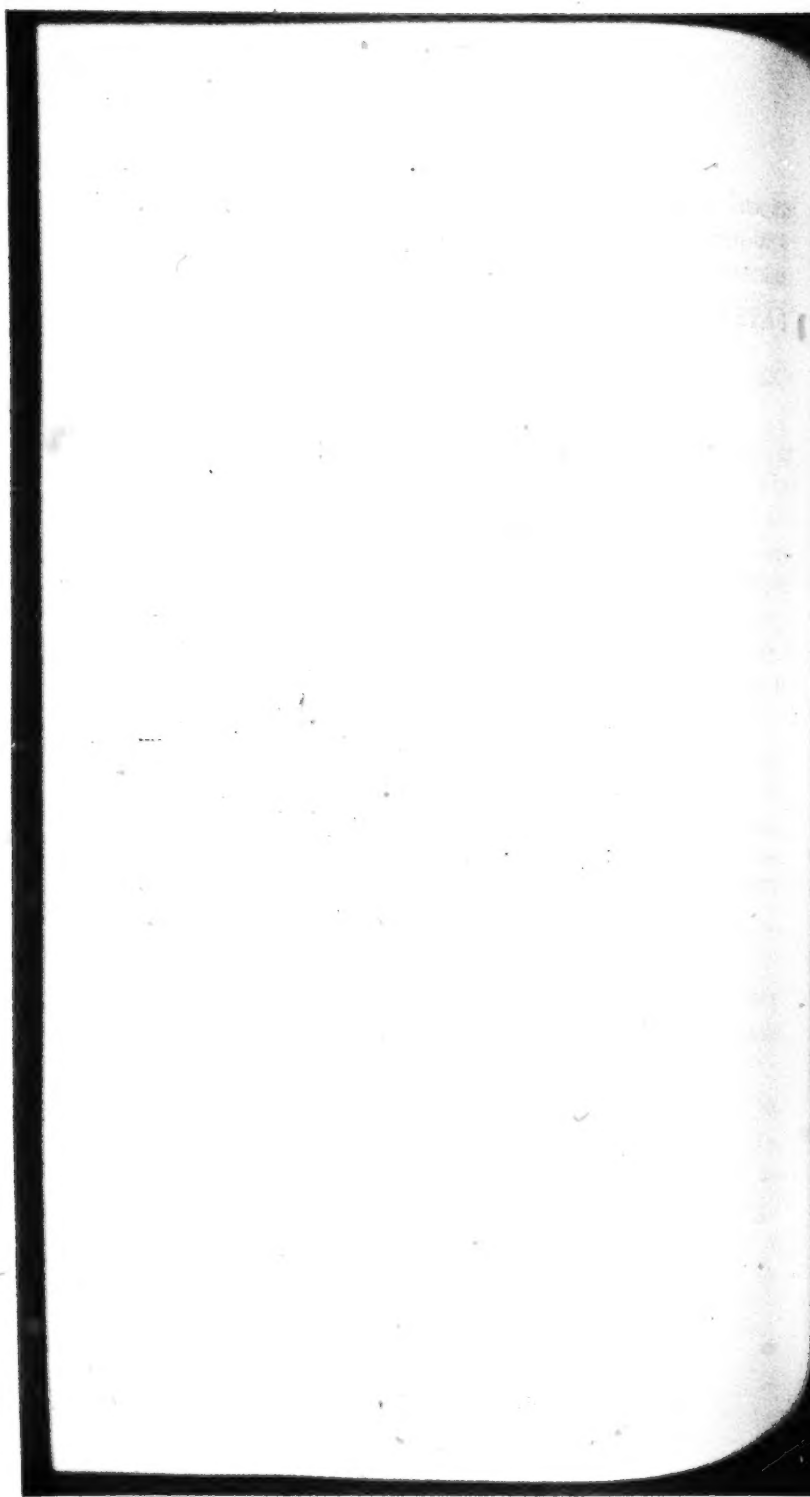
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appeal as expeditiously as possible because of the manifest public importance of the issues and the substantial amount of tax revenues that are involved.

DATED: , 1971.

ENTER:

.....
Judge, Circuit Court of Cook
County, Illinois.



JAN 6 1972

E. ROBERT SEAVER, CL

In the

Supreme Court of the United States**No. 71-674**

LAKE SHORE AUTO PARTS CO., an Illinois Corporation, on its own behalf and also as representative of a class of corporations and other "non-individuals",

*Appellant and Petitioner,**vs.*

BERNARD J. KORZEN, County Treasurer and ex-officio County Collector of Cook County, GEORGE M. KEANE and HARRY H. SEMROW, Members of the Board of Appeals of Cook County, P. J. CULLERTON, County Assessor of Cook County, EDWARD J. BARRETT, County Clerk of Cook County, and ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois,

*Appellees and Respondents.***No. 71-685**

ROBERT J. LEHNHAUSEN,

*Petitioner,**vs.*

LAKE SHORE AUTO PARTS, et al.,

*Respondent.***No. 71-691**

EDWARD J. BARRETT, County Clerk of Cook County, Illinois, et al.,

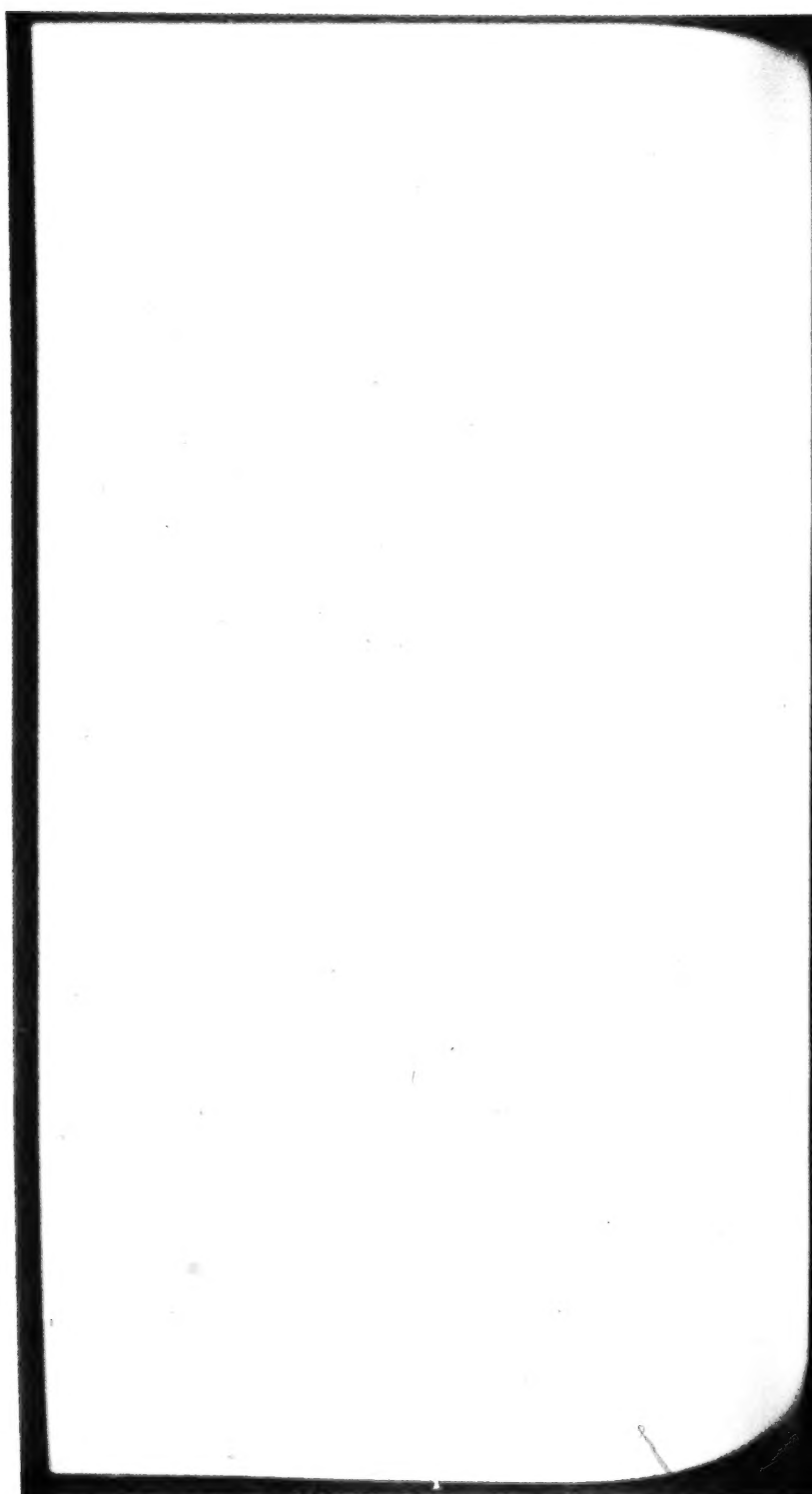
*Petitioners,**vs.*

CLEMENS K. SHAPIRO, et al.,

Respondents.

CONSOLIDATED MOTION TO STRIKE AND BRIEF IN OPPOSITION TO CASES 71-674, 71-685, 71-691 OF RESPONDENTS, EUGENE L. MAYNARD, PROVISIO TOWNSHIP HIGH SCHOOL DISTRICT #209, BELLWOOD GRADE SCHOOL DISTRICT #88, OICERO GRADE SCHOOL DISTRICT #99, and RIVER GROVE GRADE SCHOOL DISTRICT #85½, all in Cook County, Illinois.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 71-674

LAKE SHORE AUTO PARTS CO., an Illinois Corporation, on its own behalf and also as representative of a class of corporations and other "non-individuals",

Appellant and Petitioner,

vs.

BERNARD J. KORZEN, County Treasurer and ex-officio County Collector of Cook County, GEORGE M. KEANE and HARRY H. SEMROW, Members of the Board of Appeals of Cook County, P. J. CULLERTON, County Assessor of Cook County, EDWARD J. BARRETT, County Clerk of Cook County, and ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois,

Appellees and Respondents.

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondent.

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County, Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

CONSOLIDATED MOTION TO STRIKE AND BRIEF IN OPPOSITION TO CASES 71-674, 71-685, 71-691 OF RESPONDENTS, EUGENE L. MAYNARD, PROVISO TOWNSHIP HIGH SCHOOL DISTRICT #209, BELLWOOD GRADE SCHOOL DISTRICT #88, CICERO GRADE SCHOOL DISTRICT #99, and RIVER GROVE GRADE SCHOOL DISTRICT #85½, all in Cook County, Illinois.

STATEMENT OF THE CASE

This brief, being a motion to strike and a brief in opposition to petitions for writs of certiorari, is filed by Eugene L. Maynard, a citizen and taxpayer of Cook County, Illinois, and four public school districts in Cook County, Illinois, Proviso Township High School District No. 209, Bellwood Grade School District No. 88 Cicero Grade School District No. 99, and River Grove Grade School District No. 85-1/2. These respondents, hereinafter referred to as the "*Maynard* respondents" were plaintiffs in a declaratory judgment action filed by leave of the Illinois Supreme Court as a matter of original jurisdiction. That case was consolidated along with two other cases raising the same or similar issues. The three cases were argued together, and the Illinois Supreme Court issued a single opinion. The caption of those consolidated cases in the Illinois Supreme Court was as follows:

No. 44199

LAKE SHORE AUTO PARTS CO., an Illinois Corporation, on its own behalf and also as representative of a class of corporations and other "non-individuals", which class is herein described,

Appellees,

vs.

BERNARD J. KORZEN, County Treasurer and ex-officio County Collector of Cook County, GEORGE M. KEANE and HARRY H. SEMROW, Members of the Board of Appeals of Cook County, P. J. CULLERTON, County Assessor of Cook County, EDWARD J. BARRETT, County Clerk of Cook County, and ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois,

Appellants.

Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division.

Trial No. 70 CH 5123

Honorable WALTER P. DAHL, Judge Presiding.

No. 44308

EUGENE L. MAYNARD, PROVISIO TOWNSHIP HIGH SCHOOL DISTRICT #209, BELLWOOD GRADE SCHOOL DISTRICT #88, CICERO GRADE SCHOOL DISTRICT #99, and RIVER GROVE GRADE SCHOOL DISTRICT #85-1/2, all in Cook County, Illinois,
Plaintiffs,

vs.

EDWARD J. BARRETT, County Clerk of Cook County; BERNARD J. KORZEN, County Treasurer and ex-officio County Collector of Cook County; GEORGE E. KEANE and HARRY H. SEMROW, Members of the Board of Appeals of Cook County; P. J. CULLERTON, County Assessor of Cook County, and ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois,
Defendants.

Original Proceeding Relating To Revenue.

No. 44432

CLEMENS K. SHAPIRO; JEROME HERMAN, d/b/a THE SPOT; GUY S. ROSS AND EUGENE D. ROSS, d/b/a GUY S. ROSS & CO., a partnership; and M. WEIL AND SONS, INC., an Illinois Corporation, all individually and in a representative capacity,
Plaintiffs-Appellants,

vs.

EDWARD J. BARRETT, County Clerk of Cook County; BERNARD J. KORZEN, County Treasurer and ex-officio County Collector of Cook County; GEORGE E. KEANE and HARRY H. SEMROW, Members of the Board of Appeals of Cook County; P. J. CULLERTON, County Assessor of Cook County, and ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois,

Appeal from the Circuit Court of Cook County, Tax Division.
Honorable THOMAS C. DONOVAN, Judge Presiding.

The *Lake Shore Auto Parts* case is before this Court as Docket No. 71-674 on a request for an appeal and a petition for a writ of certiorari. The Attorney General of the State of Illinois, the adverse party to Lake Shore in the lower proceedings, also seeks a writ of certiorari (Docket No. 71-685). The State's Attorney of Cook County has sought a writ of certiorari in the *Shapiro* case (Docket No. 71-691). The Maynard respondents were the only parties to the previous litigation who urged the unconstitutionality

of proposed Article IX-A of the 1870 Illinois Constitution. Since that was the result reached by the Illinois Supreme Court, we, therefore, appear here to argue that the decision of the Illinois Supreme Court was: (a) correct, (b) based upon long-standing prior rulings of this Court, (c) adequate to dispose of the issues raised, and (d) sound from a public policy standpoint. This brief will take up (in order) the arguments raised in the three petitions for a writ of certiorari and the one jurisdictional statement to which it is addressed.

OPINIONS BELOW

This entire litigation arises out of the meaning and effect of an amendment to the 1870 Illinois Constitution which was initiated by Senate Joint Resolution #30 of the Illinois General Assembly passed June 30, 1969, submitted to referendum of the electorate of that state on November 3, 1970 and declared ratified on November 25, 1970. The language of that clause, called Article IX-A, is as follows:

Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

The majority, and dissenting opinions, of the Illinois Supreme Court found different legal results emanating from the language of Article IX-A. The majority opinion, written by Mr. Justice Schaefer found the language to be violative of the equal protection clause of the 14th Amendment to the United States Constitution in that:

"The new article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon

the use to which it is put, but solely upon the ownership of the property."

Mr. Justice Schaefer and the majority thus find that a property tax imposed only upon the property held by corporations is unconstitutional. Mr. Justice Davis in his dissenting opinion agrees that the intent of Article IX-A was to impose a personal property tax payable only by corporations. He then goes on to say:

"Here the question for determination is whether, absent the requirement of a state constitution that corporate and individual personal properties be taxed the same, the equal protection clause of the 14th Amendment permits them to be taxed differently? I believe that it does!"

The full opinions of the Illinois Supreme Court, the trial courts and the texts of statutes and constitutional provisions involved are to be found in the three petitions to which this brief is a response.

I

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI BY ILLINOIS ATTORNEY GENERAL ON BEHALF OF A STATE OFFICER — DOCKET NO. 71-685.

* * *

THE FINDING OF THE ILLINOIS SUPREME COURT THAT CORPORATIONS MAY NOT CONSTITUTIONALLY BE SINGLED OUT FOR AD VALOREM PERSONAL PROPERTY TAXATION IS NEITHER NOVEL NOR ERRONEOUS AND IS NOT, ALONG WITH THE RULES OF CONSTRUCTION OF ILLINOIS LAW WHICH EXPOSES THAT INFIRMITY, A PROPER SUBJECT FOR A GRANT OF REVIEW UNDER CERTIORARI JURISDICTION.

On page 27 of Illinois Attorney General William J. Scott's petition, the following statement is to be found:

"It is submitted that the issues in this case are: (1) Was the majority of the Illinois Supreme Court correct when it held that any distinction between individuals and corporations with the imposition of *ad valorem* personal property taxes was an invidious and unreasonable distinction; (2) Was Justice Davis correct in his dissent when he held that it was reasonable to distinguish between all individually owned personal property as against all corporately owned personal property; or (3) Was Judge Donovan* in error when he ruled that it is reasonable to exempt from the *ad valorem* personal property taxes "the personal property owned by individuals and used for their personal enjoyment and that of their families" and had to continue the tax upon the property of individuals, partnerships and corporations which is used for business and profit-making purposes."

* Trial judge in case #71-691.

The Attorney General, argues that his proposed Issues No. 1 and No. 2 are within the permissible ambit of certiorari jurisdiction. The substance of those two issues is, of course, whether a personal property tax collectable only from the property owned by corporations is constitutional. These respondents submit that certiorari should not be granted to consider a point so well established in law. Rule 19 of the United States Supreme Court sets out the type of case which the Court might desire to review on certiorari:

- “(b) Where a state court has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court”

A consideration of the opinion of the Illinois Supreme Court and of the case law upon which that opinion relies will show that the criteria of Rule 19 have not been met in the Attorney Generals' petition or in the other petitions.

The majority opinion in finding Article IX-A unconstitutional relies entirely upon the rule of the equal protection clause of the 14th Amendment to the Federal Constitution. Mr. Justice Schaefer writes:

“It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the Personal Property Tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others.”

Since Mr. Justice Schaefer and the majority can find no distinction between the personal property owned by an

individual and personal property owned by a corporation, the court concludes that the constitutional amendment which attempted to bring about such a result must fall on Federal constitutional grounds.

In the Illinois Supreme Court, petitioner Lake Shore correctly contended most strongly that it and other Illinois corporations could not be discriminated against by a personal property tax which applied only to corporate owned property. While the Maynard petitioners disagree with Lake Shore on a number of issues (See Argument III), we are of one mind on the clarity and settled nature of the main constitutional issue at bar. The brief of Lake Shore Auto Parts Co. in the Illinois Supreme Court contained an excellent discussion of the applicable case law in this area. We, therefore, set out pages 18 to 26 of that brief with Lake Shore's permission and our compliments:

"For nearly ninety years it has been settled doctrine that an ad valorem property tax may not be imposed which discriminates against property owners solely by reason of the fact that they are corporations. Such a classification is *per se* unreasonable, and constitutes a deprivation of the equal protection of the laws guaranteed by the 14th Amendment to the United States Constitution.

"A leading writer states this rule in the following language:

'Classification for exemption purposes may be based on the use to which property is devoted, as well as the nature of the property; but property cannot be exempted merely because of its ownership where the same kind of property owned by others is taxed . . . Instead of classifying property for the purpose of exemption either by its characteristics or by its uses, the legislature cannot classify the owners of property according to some characteristic possessed by them, or connected

[Continuation of quoted matter]

with their conduct, and thereupon base an exemption of the property of such persons, regardless of the characteristics possessed by it and of the uses to which it is put.' 1 Cooley on Taxation (4th ed.) ¶280, p. 594.

"Another author has stated 'that there would very probably be no dissent' from the proposition that the United States Supreme Court is prepared to guarantee to all corporations equality with individuals in respect to all property taxation. Sholley, Corporate Taxpayers and the Equal Protection Clause, 31 Ill. L.R. 463, 589 (1937).

"The doctrine, insofar as it is relevant to the case at bar, had its origin in two decisions of the 9th Federal Circuit Court in the *California Railroad Tax* cases: *San Mateo County v. Southern Pacific R. Co.*, 13 Fed. 722 (1882), app. dism. per. stip., 116 U.S. 138; and *Santa Clara County v. Southern Pacific R. Co.*, 18 Fed. 385 (1883), aff'd. on other grounds, 118 U.S. 394.

"The history and background of these famous cases has been detailed elsewhere.(*). The litigation arose out of a provision of the California Constitution which required that the value of any outstanding mortgage be deducted from the assessed value of real estate, *except as to railroads and other quasi-public corporations*. The chief opinion in each of the cases was written by Justice Field, an Associate Justice of the United States Supreme Court assigned to the circuit. In each case, also, there is a concurring opinion by Justice Sawyer.

(*) See, Sholley, op. cit. supra, 31 Ill. L. R. 463 at 469-74 (1937); McLaughlin, *The Court, The Corporation, and Mr. Conkling*, 46 Am. Hist. Rev. 45, 52 (1940); and see the dissenting opinion of Justice Douglas, and the concurring opinion of Justice Jackson in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576, 574 (1949).

[Continuation of quoted matter]

"Justice Field first undertook to meet the argument that the constitutional provision did nothing more than impose a 'reasonable classification', stating (13 Fed., at p. 737-8):

'It is not classifying property to provide that the property of certain parties . . . shall be assessed at its value after deducting the mortgage; and that the property of other parties . . . shall be taxed at its full value without any deduction. That is not providing for a different rate of taxation *for different kinds of property, but for unequal taxation according to the character of the owner.*' (emphasis added)

"See also Justice Field's subsequent opinion in the *Santa Clara* case (18 Fed., at p. 408), restating the basis for rejecting the 'reasonable classification' contention, and Justice Sawyer's concurring opinion in that same case (18 Fed. at p. 432).

"To the argument that even if the assessment could not be sustained as a property tax, it ought to be sustained as a franchise tax,—i.e., a 'condition of the continued existence of the railroad corporation', Justice Field presented two answers (13 Fed. at p. 754):

1) The California constitutional provision in question, and the statute thereunder, *were not intended as a franchise tax* or a condition for the continuation of the franchise;

2) The right of the state to exclude the corporation altogether does not mean that the state may, as a condition for continued permission to do business, require the corporation to waive and forego the rights otherwise guaranteed to it by the United States Constitution:

"What the state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution."

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"Despite the lack of a definitive Supreme Court decision, the *California Railroad Tax* cases immediately became accepted as the law of the land.

"In *Walker v. Northern Pacific Ry.*, 47 Fed. 681, 686 (C.C.N.D. 1891), an act of the North Dakota territorial legislature which placed real estate owned by the Northern Pacific Railroad in a more favorable tax status than that of other real estate was held to be violative of the equal protection clause of the United States Constitution.

"The holding of the *California Railroad Tax* cases has been followed on many occasions:

Northern Pacific Ry. Co. v. Sanders County, 214 Pac. 596, 599 (Mont., 1923);

State ex rel Northern Pacific Ry. Co. v. Duncan, 219 Pac. 638, 640 (Mont., 1923);

Gamble-Robinson Fruit Co. v. Thoreson, 204 N.W. 861, 864-5 (N.D. 1925);

Northwestern Improvement Co. v. State, 220 N.W. 436, 439-40 (N.D. 1928).

"In those few states wherein income taxes have been held to be taxes on property, it necessarily follows that an income tax applicable only to corporations is an unreasonable classification,—not only under the state constitution, but under the equal protection clause of the 14th Amendment as well:

Redfield v. Fisher, 292 Pac. 813 (Ore. 1930), reh. den. sub nom. *Redfield v. Norblad*, 295 Pac. 461 (1931), cert. den. 284 U.S. 617 (1931);

Aberdeen S. & L. Ass'n. v. Chase, 289 Pac. 536, 541 (Wash., 1930), op. on reh., sub nom. *Washington Mutual Savings Bank v. Chase*, 290 Pac. 697 (1930).

"It was not until 1928, in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, that the Supreme Court of the United States was squarely faced with an equal protection challenge to a state tax, not deemed an

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excise tax, which directly discriminated against corporations.

"In the *Quaker City Cab Co.* case, the United States Supreme Court, relying on *The California Railroad Tax* cases, held unconstitutional, as a violation of the equal protection clause a statute of Pennsylvania which imposed a tax on the gross receipts of incorporated taxi-cab companies (both domestic and foreign) while wholly exempting the receipts of unincorporated taxi-cab businesses.

"Although a tax on business receipts is not ordinarily thought of as a property tax, the Supreme Court stated (p. 402):

'Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations, as are taxes on their capital stock or franchises. . . . The character of the owner is the sole fact on which the distinction and discrimination are made to depend. *The tax is imposed merely because the owner is a corporation.* . . . It follows that the section fails to meet the requirement that a classification, to be consistent with the equal protection clause, must be based on a real and substantial difference having a reasonable relation to the subject of the legislation.' (emphasis added).

"Three dissenting justices took sharp issue with the majority's view that 'the tax is imposed merely because the owner is a corporation'. They viewed the tax in question as an excise tax, so that 'ownership', as such, had nothing at all to do with it.

"The 'character of the owner', of course, has no bearing whatsoever in the case of a true excise tax. By definition, ownership is irrelevant. The tax is imposed upon the *exercise* of some act or privilege. (See Annotation, What is a Property Tax as Distinguished

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From Excise, License and Other Taxes, 103 A.L.R. 18). In *Bromley v. McCaughn*, 280 U.S. 124, 137 (1929), the Supreme Court recognized that an excise or privilege tax may be imposed 'upon the exercise of one of the numerous rights of property, but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property.' (emphasis added).

"Presumably, each of the dissenting justices in *Quaker City Cab* would have joined the majority in condemning a true property tax which discriminated against corporations solely on the basis of ownership. In any event, there can be no doubt that the *Quaker City Cab* case stands for the proposition that the equal protection clause prohibits discriminatory taxation against corporations based solely on the ownership of property.

"The *Quaker City Cab* case has been followed in many subsequent cases, in both state and federal courts, e.g.:

Garysburg Mfg. Co. v. Pender County, 42 Fed.

2d 500, 506 (E.D.N.C. 1930), rev'd. on other grounds, 50 Fed. 2d 732 (4th Cir. 1931);

Mount Hope Cemetery Co. v. Pleasant, 32 Pac. 2d 500, 503 (Kan. 1934);

State v. Hunt, 9 N.E.2d 676, 681-2 (Ohio, 1937);

H. Rouw Co. v. Texas Citrus Comm'n., 247 S.W. 2d 231, 234 (Tex. 1952).

"In all of the cases thus far considered, the discrimination held unconstitutional was directed against corporations as such, and in favor of natural persons. Also relevant to the problem at hand is a long and well-established line of cases in the United States Supreme Court which have laid down the rule that a property tax may not, under the 14th Amendment, serve as the basis for discriminating against foreign corporations and in favor of domestic corporations. See *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571-2 (1949),

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and *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119 (1968).

"Both the Cook County defendants and defendant Lehnhausen rely almost exclusively upon extensive quotations from the case of *Thorpe v. Mahin*, 43 Ill.2d 36 (1969), wherein this Court, in the course of upholding the corporate-individual rate discrimination under the Illinois Income Tax Act, indicated the broad scope of classification which is permissible under the equal protection clause of the United States Constitution.

"The language of *Thorpe v. Mahin*, however, must be read in the light of the Court's preliminary holding (43 Ill. 2d at p. 42) that:

'We hold that the tax in question is not a property tax. . . .'

"The consequence of that holding was not only to free the income tax from the constraints of the uniformity clause of the Illinois Constitution (a matter with which we are not concerned in the instant case), but it also served as an essential prerequisite to this Court's ruling on the equal protection argument. This is demonstrated by this Court's strong reliance, in *Thorpe v. Mahin*, upon the leading case of *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), in which the United States Supreme Court upheld a federal tax exclusively on corporations and measured by net income.

"The result in *Flint v. Stone Tracy* depended, in the first instance, upon the Court's characterization of the tax as an excise, rather than a tax on property, and the holding on this point was preceded by an elaborate and enlightened discussion of the problem (220 U.S. at 145-147, 150-152).

"Although the equal protection clause of the 14th Amendment was not directly involved in *Flint v. Stone Tracy*, the Supreme Court did repeatedly go out of its way to observe that the criteria for reasonable classification of an excise tax under the 14th Amendment

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are comparable to the criteria under Article I, § 8, Clause 1, of the United States Constitution—the provision involved in *Flint v. Stone Tracy*, See, 220 U.S., at pp. 158 and 161.

"*Flint v. Stone Tracy* thus stands for two propositions:

(1) That a tax on businesses, measured by net income, is an excise tax and not a property tax. Hence it need not be apportioned among the several states, and it may be 'reasonably classified'.

(2) That it is reasonable to classify the excise so as to impose it only on corporations for the privilege of doing business in corporate form, while at the same time exempting unincorporated businesses and individuals.

"Similarly, *Thorpe v. Mahin* stands for two propositions:

(1) That a tax measured by income is not a property tax.

(2) That it is reasonable (under both the state constitution and the equal protection clause of the federal constitution) to classify the tax by imposing it only on corporations for the privilege of doing business in corporate form, while at the same time exempting unincorporated businesses and individuals, or taxing them at a lesser rate or on a different base.

"Neither case offers any support to defendants' apparent contention that a *property tax* may be classified solely on the basis of the ownership of the property."

(End of quoted material.)

The only important case cited by the Attorney General and not discussed in the Lake Shore brief is *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959). In that case Ohio passed a statute exempting from ad valorem taxation "merchandise or agricultural products belonging to a non-resident . . . if held in a storage warehouse for storage

only". The plaintiff, an Ohio corporation, sued the tax commissioner of the state alleging that the statute denied equal protection of the laws to residents of Ohio. The Supreme Court found that the exemption was constitutional. The Illinois Attorney General attempts to use the *Allied* case to indicate that the same wide latitude which exists in income tax classification carries over to ad valorem taxation. While the Court does invite state inventiveness in tax classifications, the facts of the *Allied* case and the opinions of the Supreme Court are not helpful to the petitioner's argument. In *Allied*, the classification did not create an exemption based upon a corporate-individual dichotomy. The distinction was not upon ownership but upon residence coupled with a state policy. The majority opinion discussed in detail the possible public policy reasons which might have motivated the Ohio legislature in passing the law.

Unlike the Ohio case, no economic benefit to particular select groups or particular industries was to be brought about by Illinois Article IX-A. In the present case the only motivation which has been or could be suggested for the passage of Article IX-A is that the corporate taxpayer is a lucrative and easy target for taxation. The language previously quoted from Mr. Justice Schaefer's opinion is the best proof that the Illinois Supreme Court sought but was unable to find any legitimate policy motive underlying the admitted discrimination:

"It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set."

The argument of the Maynard respondents is not limited to the fact that no public policy justification for the corporate discrimination was presented to nor found to exist by the Illinois Supreme Court. At this late date there is no acceptable public policy justification for the course urged by the Illinois Attorney General. Any attempt to strip corporations of the constitutional protections emanating from the *Quaker City Cab* case must be made in the face of the practical results of such a decision. Courts have agreed that corporations can be compelled to pay franchise taxes and higher rate income taxes for engaging in the same businesses as non-corporate entities. Corporations have, however, for 90 years, been free of arbitrary classification in ad valorem taxation. Corporate decisions and state taxation systems and policies have been made upon this firm and basic assumption of constitutional law. To upset such law would be to make corporations non-persons for the purposes of the United States Constitution and effectively end the equal protection guarantee in the field of corporate taxation. Such a startling change of American law should hardly be the end result of one small piece of bad draftsmanship by the Illinois General Assembly.

As the third ground for review, the Attorney General presents an approach suggested by the trial court judge in the *Shapiro* case. In *Shapiro*, Judge Donovan thought to avoid all constitutional issues by so interpreting Article IX-A as to free it from any constitutional infirmity. At page A-39 of the Attorney General's petition, a clause of Judge Donovan's order is set out as follows:

"That Article IX-A is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation ex-

clusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families."

The argument that Article IX-A prohibits the taxation of the non-business personal property of natural persons is an attractive one. In the Maynard respondents' brief and oral arguments before the Illinois Supreme Court, we presented that position to the court as an alternative argument. The alternative argument rests purely upon an appeal to rules of statutory interpretation concerning the meaning of the word "individuals". Such an interpretation, had it been adopted, would have permitted the court to avoid any constitutional issues. Despite the fact that this approach was suggested by the *Maynard* plaintiffs, the State's Attorney of Cook County, and the Attorney General of the State of Illinois, both the majority and dissenting opinion of the Illinois Supreme Court, rejected that tactfully limited interpretation of the phrase "as to individuals". Both Mr. Justice Davis and Mr. Justice Schaefer felt that the only valid issue in this case related to the validity of Article IX-A in light of the equal protection clause. The majority opinion specifically discussed and rejected the proffered interpretation of state law which would have avoided constitutional infirmity.

It has been the oft-stated opinion of the United States Supreme Court that it is bound by judgments of State Supreme Courts on questions of state law. *Henry v. Mississippi*, 379 U.S. 443 (1965); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Madden v. Kentucky*, 309 U.S. 83 (1940). Thus, the United States Supreme Court has bound itself to accept a State Supreme Court's construction of a State Constitutional provision or statute. *Cramp v. Board of Public*

Instruction, 368 U.S. 278 (1961); *First National Bank v. Ayers*, 160 U.S. 660 (1896). Petitioner's third stated issue flies in the face of this established principle of Federal law.

In the case at bar, the Illinois Supreme Court has considered and unanimously rejected the contentions stated by the Illinois Attorney General as Issues No. 1, 2, and 3. By its own decisions, the United States Supreme Court should not grant certiorari to reconsider either a matter of long-standing Federal law or a state statutory interpretation previously disposed of by the highest court of the state.

II.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI BY STATE'S ATTORNEY OF COOK COUNTY ON BEHALF OF COUNTY OFFICERS—DOCKET NO. 71-691.

* * *

THE ILLINOIS CONSTITUTION OF 1970, EFFECTIVE JULY 1, 1971, MADE NO CHANGE IN THE CRITERIA GOVERNING DECISION OF THIS CASE. THE ILLINOIS SUPREME COURT DID NOT IGNORE OR OVERLOOK THE NEW ILLINOIS CONSTITUTION BUT CORRECTLY CONCLUDED THAT THE BASIC FEDERAL QUESTION, INVOLVING VIOLATION OF THE EQUAL PROTECTION CLAUSE, REMAINED UNAFFECTED BY THE NEW CONSTITUTION.

The petition for writ of certiorari, filed by Edward J. Barrett, County Clerk of Cook County, et al., is devoted almost completely to arguments concerning the adoption of the Illinois Constitution of 1970 which became effective several days prior to the rendition of the opinion and judgment herein sought to be reviewed. Without explaining how the new Constitution remedied the invidious discrimination implicit in Article IX-A of the 1870 Constitution and violative of the equal protection clause, petitioners charge that the Illinois Supreme Court ignored the new constitution, which in their view introduced a new dimension in this case. In developing this theme, they present a number of unsupported and irrelevant variations. For example, in "Questions Presented" they gratuitously demand to know how "the highest court of the state can ignore the existence of the new state constitution . . . and circumscribe the extent of its examination in determining the public policy of the state . . .?" They ask how the court could ignore the context in which Article IX-A of the prior constitution was adopted, claiming the constitutional

amendment which was held invalid was "the first step of the program provided in the new constitution for the eventual abolishment of the personal property tax." They strongly imply that either by oversight (Pet. p. 39) or by deliberate design (Pet. p. 5) the Illinois Supreme Court ignored its own precedents and failed to apply the law existing at the time of decision in favor of the law existing at the time the case arose. Petitioners even go so far as to argue that by failing to mention the new constitution of 1970 in its opinion, the Illinois Supreme Court "caused to be born . . . a substantial federal question impelling this court's consideration . . ." (Pet. p. 5).

We take issue with these arguments of the petitioners. The contention that the Illinois Supreme Court ignored or overlooked the advent of the Illinois Constitution of 1970 is totally unsupportable in point of fact. The petitioners' arguments that the Constitution of 1970 requires validation of Article IX-A are likewise without merit in point of law.

To argue that the Illinois Supreme Court would ignore or overlook such an important development in the supreme law of the state as the taking effect of a new constitution is scarcely plausible on its face. The facts are totally the other way. Both in the briefs and in the oral arguments presented to that Court, the new constitution was the subject of serious and repeated references by counsel for the several parties. The leave granted to these respondents (as petitioners in Maynard No. 44308) to file as a matter of original jurisdiction their petition for declaratory judgment, was in response to their petition which recited the importance of considering the new constitution, as well as the old, in deciding the issues of the case and contained their offer to make such a presentation to the Court. One of the respondents' attorneys who par-

ticipated in the arguments before the Illinois Supreme Court, served as President of the Sixth Illinois Constitutional Convention, the body which drafted the new constitution. Clearly the court was aware of the new constitution and its provisions relating to personal property taxation.

It should be obvious that there is no rational basis for concluding, as petitioners have done, that because the court failed to mention the new Constitution in its opinion it either ignored or overlooked the document. It is evident from the opinion that the court viewed the basic Federal constitutional question, i.e., the violation of the equal protection clause, as unaffected by the emergence of the Illinois Constitution of 1970.

Petitioners would justify the invidious discrimination implicit in the constitutional amendment by urging upon this court that there is a public policy in Illinois which looks to ultimate abolishment of all *ad valorem* personal property taxation. That such a policy exists is clear; that such a policy cannot justify violation of the equal protection clause is equally clear. Petitioners assert (and petitioner Lake Shore Auto Parts, Inc. (Pet. p. 7) makes a similar argument) that Article IX-A was the initial step in a program of the new Constitution to end all such taxation by 1979. These interpretations are at the best but half truths, and petitioners are totally in error if they mean to assert that the new Constitution mandates immediate abolishment of individual personal property taxes. To the contrary, the new document carries forward only such individual exemptions as shall ultimately be defined and held valid by the courts. That, of course, is what the present case is all about and hence petitioners beg the question by their circuitous argument.

The Constitutional amendment, which is at issue in this case, was proposed by Senate Joint Resolution No. 30 enacted by the Illinois General Assembly *following* the call of the Constitutional Convention and *prior* to its convening. The amendment was required to be voted on at the general election of November 3, 1970, which occurred prior to the referendum on the new constitution.

Thus, throughout its deliberations, the Convention was faced with a drafting dilemma. It was necessary for it either to structure any revenue article of a new constitution with concern for the meaning, application and legal effect of the pending Constitutional amendment—matters which were anything but clear; or it could proceed to draft new provisions without concern for the pending proposition—a course publicly unacceptable. The difficulty was also compounded by the doubts which existed concerning the interpretation of the word “individuals” as used in the amendment and doubts concerning the constitutionality of particular interpretations under the equal protection clause. A measure of the uncertainty felt by many delegates to the Convention was aptly expressed in floor debate by Stanley C. Johnson, a member of the Revenue Committee, who stated:

“Mr. President, the amendment in November is clouded with so much uncertainty as to its application that we will be years, we fear, trying to figure out what it really means. There have been opinions registered that it will not apply to joint tenants, that it will not apply to trusts, that it will not apply to partnerships. Certainly it will not apply to corporations. So that it may eventually boil down to what it applies to is whether or not the property is used in the production of income or not.” (June 25, 1970, Transcript Vol. 74, p. 11)

Professor Dawn Clark Netsch, who served as Vice Chairman of the Revenue Committee (referring to Section 5(b) of Article IX of the Constitution of 1970, hereinafter quoted) wrote in the November, 1970 issue of the Chicago Bar Record, p. 114:

"The coverage of this subsection depends, in turn, on the coverage of the proposed November amendment abolishing the tax 'as to individuals'. Presumably, the courts will have settled these questions by the time the personal property tax is finally eliminated in 1979. If the courts should decide—possibly to avoid equal protection issues—that an individual engaged in a retail grocery business as a sole proprietorship is not relieved of paying the personal property tax pursuant to the November referendum because his competitor down the street, who is incorporated, is not relieved, that business individual would be picked up by subsection (c) and relieved of the tax in the second phase-out. He would then be liable for a share of the replacement tax."

In this context of timing problems and uncertainties as to meaning and legality the Convention drafted a constitutional program, subsequently approved by the voters, which provided for *legislative* phasing-out of all *ad valorem* personal property taxation by 1979, with safe-guards to avoid disastrous results to the public schools and municipal services. The program did not mandate the immediate exemption of individuals from personal property taxation as suggested by petitioners. It merely provided for the recognition of such abolition of individual personal property taxation, if any, as the courts would determine to have occurred under the preceding constitution as amended by Article IX-A.

The program is set forth in Article IX, Section 5 of the 1970 Constitution, reading as follows:

"Section 5. PERSONAL PROPERTY TAXATION

(a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.

(b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.

(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes shall not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3(a) of this Article."

(Underscoring supplied)

In view of the clear and unambiguous language of Section 5(c), it is futile for petitioners to argue that the Illinois Supreme Court erred in failing to apply the law existing at the time of its decision and to argue that it departed from its own rule concerning applicable law stated in *Illinois Chiropractic Society v. Giello*, 18 Ill. 2nd 306 (1960). The duty of the court under the new constitution was to

determine whether any *ad valorem* personal property taxation had been abolished "on or before the effective date" of the new constitution. By necessity, this required the testing of Article IX-A under the standards prescribed under the preceding Illinois Constitution of 1870 and principally under the Federal Constitution. To argue, as petitioners do, that the omission in the opinion of any reference to the new state constitution, in and of itself deprived them of due process and equal protection of the laws in consequence of which this Honorable Court should now supervise and "set aright" the highest court of Illinois, is at once irresponsible and fatuous.

Even if the drafters of the new Illinois Constitution had sought to incorporate Article IX-A into the continuing fundamental law of the state, which petitioners erroneously contend was the case, it is obvious that such an incorporation could not validate a phrase repugnant to the 14th Amendment of the Federal Constitution. The Cook County State's Attorney is really arguing that even if Article IX-A creates an unconstitutional exemption, that defect will be cured in the course of 8 years as everyone becomes exempt. No cases or theories can be cited to support such an ephemeral and transitory view of equal protection. As was shown in Argument I, if Article IX-A taxes corporate personal property and exempts all else it is unconstitutional irrespective of any trappings of rationale or good intention with which petitioners may seek to clothe it.

The basic question remains unaffected by the new Illinois Constitution. That question is whether or not the creation of a given classification of property taxpayers finds its justification in more than a desire to free one class from taxation while imposing a property tax upon another. Certainly any future classification adopted by the Illinois General Assembly pursuant to Article IX, Section 5(a)

of the new Constitution will be similarly tested under Federal standards. If, as in the case of Article IX-A of the 1870 Constitution, it should be found to discriminate invidiously it will likewise violate the requirement of equal protection of the laws of the 14th Amendment and be without force or effect.

This basic fact cannot be sidestepped by the reiteration of vague and amorphous appeals to "public policy", (Pet. p. 4) incantations concerning the "exquisite, juridical intimacy" (Pet. p. 3) of old and new constitutions, unwarranted charges of judicial oversight or neglect and similar arguments designed to ignore the fundamental issue. We submit that the Barrett petitioners have failed to present to this Honorable Court any valid reason for issuance of the Writ of Certiorari.

III.

**MOTION TO DISMISS AND BRIEF IN OPPOSITION
TO PETITION OF LAKE SHORE AUTO PARTS CO.—
DOCKET NO. 71-674.**

* * *

WHERE A LITIGANT CONCEDES THAT ITS CLAIM OF UNCONSTITUTIONALITY HAS BEEN CORRECTED BY THE DECISION OF A STATE SUPREME COURT AND BENEFIT HAS THEREBY BEEN BROUGHT TO THE LITIGANTS CLASS, A FURTHER APPEAL SHOULD NOT BE GRANTED ON THE SOLE GROUND THAT A FINANCIALLY MORE BOUNTIFUL RESULT IS SOUGHT.

In case No. 71-674, the Lake Shore Auto Parts Company seeks to invoke the jurisdiction of this court either by appeal or by certiorari. The supposed right to appeal emanates from 28 U.S.C. Section(2) which reads as follows:

“Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United State, and the decision is in favor of its validity.”

This Court may wonder why all other parties to the consolidated cases appear to be arguing the questions of constitutionality of Article IX-A of the Illinois Constitution while Lake Shore Auto Parts is arguing the invalidity of a statute, i.e., the Illinois Revenue Act. In order to answer that question, the options of advocacy open to Lake Shore prior to filing their litigation must be considered.

Lake Shore Auto Parts Company is an Illinois corporation. In the trial court its case was brought as a class action on behalf of all corporations in the state. Lake

Shore most effectively represents its class when it succeeds in bringing about a total abolition of personal property taxes for corporations. This result would not be accomplished if Lake Shore attacked the constitutionality of Article IX-A. If Article IX-A is unconstitutional, then the prior provisions of Illinois law will continue in force until changed. Under the existing revenue act, corporations, business entities and individuals (however that term be defined) would continue to be subject to personal property taxation. (Chapter 120, Section 499, Illinois Revised Statutes (1969).) Such is the result brought about by the decision of the Illinois Supreme Court. The optimum result for a litigating corporation would be not the sharing of taxation but the abolition of the tax for corporations and, ironically, for everyone else as well. The Lake Shore Auto Parts Company has constructed its argument in the trial court, in the Illinois Supreme Court, and in this court with that goal in mind.

The complaint of Lake Shore Auto Parts Company in the trial court did not allege the unconstitutionality of Article IX-A; instead, Lake Shore was scrupulously careful to limit its constitutional attack to a prior existing revenue statute rather than to the constitutional amendment. Its argument can be paraphrased as follows:

The Revenue Act of the State of Illinois (Chapter 120, Section 482, et seq., Illinois Revised Statutes, 1969) provided prior to the passage of Article IX-A for ad valorem personal property taxation of all real and personal property in the State with certain exceptions. The effect of the passage and approval of Article IX-A was to amend the Revenue Act so as to repeal the personal property tax for all but corporations. Once this amendment by implication was accomplished, it is the personal property tax statute which must itself be swept away as a violation of the 14th Amendment because of its discrimination against

corporations. The new amendment to the Illinois constitution is thus ignored and allowed to stand. The result of this theory of interpretation is that the Illinois Revenue Act, as it relates to personal property is, in its entirety, declared unconstitutional.

Since the Revenue Act is the only statutory enactment of the state regarding the establishment of a personal property tax, the result of such a judicial finding would be an immediate abolition of ad valorem personal property for all taxpayers in the state.

At the trial court level, *Lake Shore* was able to achieve the amazing result of the judicial abolition of an established and important tax by averting the view of the court from the question of the constitutionality of Article IX-A itself. The *Maynard* respondents submit that since Article IX-A so defines individuals as to exclude only corporations from the scope of its exemption, that it is irretrievably unconstitutional. We as respondents, likewise, submit that the Illinois Revenue Act (which has been constitutional for 30 years) has not suddenly become unconstitutional.

Section 499 of the Illinois Revenue Act (Chapter 120, *Illinois Revised Statutes*, 1969) has, since 1939, defined the personal and real property of this state which is subject to taxation. Sections 500 through 500.23 of the Act define property put to certain uses as exempt from such taxes. It would need little argument to show that if a particular exemption adopted by statute were unconstitutional it would be the exemption rather than the entire tax which would fall. An exemption, for example, of all personal property owned by United States Congressmen would undoubtedly fall before a constitutional attack. Such an attack, however, would leave the general personal property tax enabling section unaffected and in full force. This case differs from that situation in only one respect. The exemp-

tion is contained not in the Revenue Act but in the Constitutional amendment, Article IX-A. That difference, however, can hardly justify the effect of the *Lake Shore* trial court's ruling which was to uphold the enactment that created the invidious distinction and to strike down the enactment that did not. Such a strange ruling could only be the result of the trial court's misconception that as between a valid and constitutional statute and a constitutional amendment that creates an invidious classification, the statute must fall to save the constitutional amendment. Such is not the law.

In *Reitman v. Mulkey*, 387 U.S. 369 (1967), an amendment to the California Constitution would have repealed prior "open housing" statutes. This Court affirmed the judgment of the California Supreme Court which ruled the *constitutional amendment* to be unconstitutional and the prior statutes to remain in effect. In reaching its decisions, the California Court looked to several factors:

A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective (In re *Petraeus* (1939) 12 Cal. 2d 579, 583, 86 P.2d 343; see *Griffin v. County School Board*, 377 U.S. 218, 231, 84 S.Ct. 1226, 12 L.Ed.2d 256), and for its ultimate effect (*Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 880, 31 Cal. Rptr. 606, 382 P.2d 878; *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 341-343, 81 S.Ct. 125, 5 L.Ed.2d 110; *Avery v. State of Georgia* (1953) 345 U.S. 559, 562, 73 S.Ct. 891, 97 L.Ed. 1244; *Near v. State of Minnesota* (1931) 283 U.S. 697, 708-709, 51 S.Ct. 625, 75 L.Ed. 1357). To determine the validity of the enactment in this respect it must be viewed in light of its historical context and the conditions existing prior to its enactment. (*Select Base Materials v. Board of Equalization* (1959) 51 Cal.2d 640, 645, 335 P.2d 672; *Evans v. Selma Union High School Dist.* (1924) 193 Cal. 54, 57-58, 222

P. 801, 31 A.L.R. 1121; see *Snowden v. Hughes* (1944)
321 U.S. 1, 8-9, 64 S.Ct. 397, 88 L.Ed. 497.)
[*Mulkey v. Reitman*, 50 Cal. Rep. 881, 884]

The Supreme Court of the United States specifically endorsed this method of interpretation and announced that: "Judgments such as these we have frequently undertaken ourselves." [citing cases] (387 U.S. at 373)

The *Reitman* case involved racial discrimination while the case at bar involves economic discrimination. In the *Reitman* case the Court looked to the entire state of the law. Both the constitutional amendment and the statute had to be construed together to test whether a constitutional result would be reached. When the two enactments read together lead to unconstitutionality, the enactment most responsible for that result was ruled to be void. Thus this Court rejected the argument that the constitutional amendment there in question was valid while the underlying statutes must fall. The effect of the California *constitutional amendment* was to sanction racial discrimination. Likewise, in the case at bar, it is the constitutional amendment and not the (revenue) statute which effects a violation of the equal protection clause.

Article IX-A must be viewed together with other pertinent provisions of Illinois law. If, as the *Lake Shore* trial court ruled, Article IX-A causes the Revenue Act to be unconstitutional, it will abolish all personal property taxes in the state. Such a result would not be consistent with the intent of the Legislature in proposing the amendment nor consistent with the intent of the people in approving the amendment. Both the Legislature and the people contemplated that some class or classes would continue to pay personal property taxes even after the effective date of Article IX-A. Whatever the Legislature and the people had in mind, it can at least be said that they anticipated a limited

tax exemption and not a total tax abolition. In *Village of Glencoe v. Hurford*, 317 Ill. 203, 148 N.E. 69, the Illinois Supreme Court said:

"When the literal enforcement of a statute would result in great injustice and lead to consequences which the legislature could not have contemplated, the courts are bound to presume that such consequences were not intended and will adopt a construction which it may be reasonable to presume was contemplated by the Legislature." (at 220)

That Court has also said:

"If a statute admits of two constructions, one of which renders the enactment reasonable and salutary while the other renders it mischievous, if not absurd, the latter construction should be avoided."

[*Karlson v. Murphy*, 387 Ill. 436, 443]

The *Lake Shore* interpretation of Article IX-A would, in the most offhanded the unconscious of ways, entirely repeal an important tax utilized by almost every public body in Illinois. The Illinois Supreme Court, by ruling that Article IX-A alone was violative of the 14th Amendment, continued the validity of the Illinois Revenue Act as it existed prior to November 1970. The public bodies of Illinois thus will continue to receive adequate funding, and the Legislative (and ultimately the people of this state) will be free to more clearly define their desires by statutory or constitutional action under "phasing out" provisions provided in Section 5 of Article IX of the new Illinois Constitution.

Lake Shore seeks to invoke the Appellate jurisdiction of this court by the intriguing argument that its attack upon the constitutionality of the revenue act was rejected by the Illinois Supreme Court. The Lake Shore petitioner admits (at page 11 of its brief to this Court) the following:

"It is true that the result reached by the Illinois court does eliminate the unconstitutional discrimination which would otherwise exist as a consequence of the interaction between Article IX-A and the revenue act."

The petitioner's objection, however, is that the Illinois Supreme Court has chosen the wrong act to declare unconstitutional. Where by its own admission the unconstitutionality complained of has ceased and no new unconstitutionality has thereby been created, the appellant surely has no recourse to the appellate jurisdiction of this Court under Section 1257(2) in order to achieve still greater economic benefit for the class it seeks to represent.

In his petition for certiorari, the Lake Shore brief introduces the inventive, though transplanted, concept of "chilling" into a civil litigation involving taxation (Lake Shore brief p. 10). The basic argument is that Lake Shore began this litigation to free itself from a tax from which others were unconstitutionally exempt. Lake Shore complains that for all its trouble, it ended up by having the tax restored. Lake Shore and other potential attackers of economic discrimination are thus, we are told, chilled from commencing or proceeding with such publicly important and valuable litigation. The argument falters on a number of grounds:

(1) No cases cited by Lake Shore to support the concept of economic chilling come remotely near the case at bar. All fourteen cases cited* exemplify the two decade

*¹ *Wiemann v. Updegraff*, 344 U.S. 183 (1952): teachers' loyalty oath invalidated; freedom of association (1st) and due process (14th); concurring, Frankfurter, Jr. referred to the oath as an "unwarranted inhibition upon the free spirit of teachers" and of its "tendency to chill . . . free play of the spirit." [p. 195]. ² *Shelton v. Tucker*, 364 U.S. 479 (1960): teachers' organization membership affidavit invalidated; freedom of association (1st) and due process

old concept that certain freedoms and civil liberties can be chilled by governmental enactments which restrict the right

•• (Continued)

(14th). ⁹ *Smith v. People*, 361 U.S. 147 (1959): ordinance imposing criminal liability upon bookseller for possession of obscene book invalidated; freedom of press (1st) and due process (14th). ¹⁰ *Anderson v. Martin*, 375 U.S. 399 (1964): statute requiring racial identifications on ballots, etc., invalidated; racial discrimination, equal protection (14th). ¹¹ *Freedman v. Maryland*, 380 U.S. 51 (1965): movie censorship law invalidated; freedom of expression (1st) and due process (14th). ¹² *Dombrowski v. Pfister*, 380 U.S. 479 (1965): statute creating offense for failure to register as Communist-front organization, inter alia, invalidated; freedoms of association and speech (1st) and due process (14th); chilling effect of threatened prosecution. ¹³ *Harman v. Forssenius*, 380 U.S. 528 (1965): poll tax and residency certificate invalidated; 24th and 14th Amendments. ¹⁴ *Griffin v. California*, 380 U.S. 609 (1965): California Constitutional provision permitting court and counsel to comment on defendant's failure to testify invalidated; self-incrimination (5th) and due process (14th). ¹⁵ *Time, Inc. v. Hill*, 385 U.S. 374 (1967): statute permitting right of privacy actions for public statements invalidated; freedom of press and speech (1st and 14th). ¹⁶ *Keyishian v. Board of Regents*, 385 U.S. 589 (1967): statutes aimed at subversive expression and associations invalidated; freedoms of speech and association (1st and 14th). ¹⁷ *U. S. v. Jackson*, 390 U.S. 570 (1968): statute authorizing only jury to impose death penalty under Kidnapping Act invalidated; right to plead not guilty (5th) and right to jury trial (6th). ¹⁸ *Walker v. Birmingham*, 388 U.S. 307 (1967): parade permit; freedoms of speech and association (1st). ¹⁹ *Shapiro v. Thompson*, 394 U.S. 618 (1969): statute requiring one year residency for welfare invalidated; right to travel, due process (5th and 14th). ²⁰ *Palmer v. Thompson*, U.S., 91 S.Ct. 1940 (1971): refusal to find 13th and 14th Amendment violations when city closed public segregated swimming pools upon judgment operation of same is unconstitutional. Dissent argued that the effect of this State Action was to chill the assertion of constitutional rights by penalizing those who chose to assert them.

to expression of these freedoms. The cases principally involve the limitation of First Amendment freedoms by state or local laws. The only chilling effect suggested by the Lake Shore petitioner is that it didn't get exactly what it sought in its lawsuit. If such a right to fully succeed in litigation were constitutional, the day of glory would be upon us.

(2) In truth, the decision of the Illinois Supreme Court does have a chilling effect upon Lake Shore, but such effect is hardly of constitutional significance. That chill relates only to class action damages and legal fees. As has been noted, the Lake Shore case was filed by a single small auto parts corporation on behalf of all corporations in the state. If Lake Shore could have succeeded in the Illinois Supreme Court in having its trial court decision sustained, over \$250,000,000.00 in taxes would have been instantly abolished. The class action damages and attorneys fees to be awarded in such a triumph would surely have warmed client and attorney alike. In that sense, and only in that sense, did the Illinois Supreme Court's opinion chill the Lake Shore petitioner.

(3) If the Lake Shore petitioner were truly interested in itself and its class being placed on a constitutional equality with all other Illinois taxpayers, it would applaud the decision of the Illinois Supreme Court. The Illinois Supreme Court removed the exemption from "individuals" and placed all such taxpayers back in the taxpaying pool. The tax burden is thus shared once again by corporations and individuals. The corporations of the state and Lake Shore itself therefore benefited financially by the broadened tax base. The prayer of the Lake Shore Auto Parts Co. for constitutional equality was granted by Mr. Justice Schaefer's opinion. That the prayer was not answered more bountifully should hardly concern this court.

The *Maynard* respondents submit the arguments put forward by Lake Shore are not sufficient to cause this Court to either note probable jurisdiction or issue its writ of certiorari.

CONCLUSION

In a well litigated and vigorously contested lawsuit the Illinois Supreme Court found that the Constitution of the United States would not be bent so as to make corporations the only payers of the Illinois ad valorem personal property tax. The Court, perhaps realizing that corporations can hardly defend themselves at the polls against invidious discrimination, rejected the attempts of legislators to bestow such a singular burden upon them. The Illinois Supreme Court relied upon established precedents of this Honorable Court in reaching its politically unpopular but legally correct and just result. This Court need hardly hear the case to restate the point that the equal protection clause of the 14th Amendment does not shift with prevailing political winds. Therefore the motion to dismiss should be granted and the petitions for writ of certiorari denied.

Respectfully submitted,

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71-685

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1971

No.

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondent.

AMENDED PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1971

No.

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondent.

**AMENDED PETITION FOR WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT**

Petitioner, Robert J. Lehnhausen, Director of the Department of Local Government Affairs, State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Supreme Court entered in this proceeding on July 9, 1971, holding Article IX-A of the 1870 State Constitution in contravention of the Fourteenth Amendment to the United States Constitution, and the dissenting opinion entered in this proceeding on July 26, 1971.

Petitioner respectfully submits this petition in accordance with Rules 21, 22 and 23 of the Revised Rules of the United States Supreme Court to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINIONS BELOW

The decision of the Illinois Supreme Court which is the subject of this appeal is not yet officially reported. A complete copy of the decision and the dissent filed therewith is attached to this petition as Appendix "A". The two lower court decisions involved are also attached. The decision of Judge Dahl of the Cook County Circuit Court in the *Lake Shore Auto Parts v. Korzen* case is attached as Appendix "B", and the decision of Judge Donovan of the Circuit Court of Cook County in the *Clemens K. Shapiro, et al v. Edward J. Barrett et al.* case is attached as Appendix "C".

JURISDICTION

The opinion filed July 9, 1971, and the dissent, filed July 26, 1971, related to a consolidation of three cases, two of which arose in the Circuit Court of Cook County, Illinois, and proceeded to the Supreme Court of Illinois by direct appeal; the third was an original action in the Supreme Court of Illinois.

A Petition for Rehearing was filed by petitioner herein on July 30, 1971. It was denied on August 24, 1971.

The majority opinion held that Article IX-A of the 1870 Constitution contravened the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. Jurisdiction of this Court to review this decision by Writ of Certiorari is conferred by 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IX-A of the 1870 Illinois Constitution, submitted to the electorate on November 3, 1970 and declared ratified on November 25, 1970, the text of which is set forth below, was found by the Illinois Supreme Court to contravene the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

"Article IX-A

TAXATION OF PROPERTY

"§ 1. Taxation of personal property prohibited.

"Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

"SCHEDULE

"Paragraph 1. This amendment shall become effective January 1, 1971."

"EXPLANATION OF AMENDMENT

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not effect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870 Article IX-A, thus setting aside existing provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

QUESTION PRESENTED

Whether a State may, consistent with the Equal Protection Clause of the Fourteenth Amendment, abolish the *ad valorem* personal property tax with respect to individuals, but retain such tax as it applies to non-individuals?

STATEMENT OF FACTS

There is apparently no dispute as to the facts.

Prior to January 1, 1971, Section 1 of Article IX of the Illinois Constitution of 1870 provided as follows:

"Taxation of Property—Occupations—Privileges.

§ 1. The General Assembly shall provide such revenue as may be needful, by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion of his, her, or its property—such value to be ascertained by some person or persons, to be

elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor-dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates."

Pursuant to this constitutional provision, an *ad valorem* personal property tax was imposed upon all entities, individuals, partnerships, corporations, etc., on the value of their personal property. It is a matter of public record in the State of Illinois that this tax has been most inequitable and has lacked uniformity and consistency in its application to the taxpayers of this State. The personal property tax, if enforced, assessed and collected as provided for by law would have been confiscatory in most instances. It has been, through the years, assessed and collected in an unconstitutional manner.

The State of Illinois is divided into three population centers, spread over 102 counties. Cook County has a population approximately equal to the 101 "downstate" counties (many of the "downstate" counties actually lie north or northwest of Cook County), and a financial worth far in excess of the total of the other 101 counties. Cook County is divided into the City of Chicago (the second largest city in the United States) and the Cook County suburban area. Except as to corporations and a few very large businesses (non-incorporated), personal property taxes have neither been assessed nor collected with-

in the City of Chicago. Such is not true within the Cook County suburban area, nor is it true in the 101 "downstate" counties. Even in the areas where the personal property taxes were assessed and collected, they were not collected in accordance with the provisions of the law, nor with any regard to equity or uniformity. For example, Maurice W. Scott, Executive Vice President of the Taxpayers' Federation of Illinois, testified in public hearing before the members of the Illinois House Revenue Committee on September 8, 1971, that the *ad valorem* personal property tax as it was on November 2, 1970, actually collected the following amounts:

(a) *Cook County* —

Personal property tax on corporations	\$126,000,000
Personal property tax on unincorporated business	13,000,000
Personal property tax on individuals	2,000,000
	<hr/>
	\$141,000,000

(b) *Downstate Counties* —

Personal property tax on corporations	\$111,000,000
Personal property tax on unincorporated business	20,000,000
Personal property tax on individuals	27,000,000
	<hr/>
	\$158,000,000

At that same Committee hearing, State Representative Harber Hall (R. — Normal) stated "The farmers down my way are refusing to disclose what they own. Some are not even letting assessors on the premises. I get the distinct feeling that people are just not going to pay the personal property tax this year, no matter what."

The 1970 census figures of the United States Government show Cook County with a population of 5,427,237 and a total State population of 10,977,908. This means there is a total population in the 101 counties, excluding Cook County of 5,550,671. With the population almost equally divided between Cook County and the 101 "down-state" counties, the personal property taxes collected from individuals in Cook County in 1970 was \$2,000,000, as against \$27,000,000 collected from individuals in all the other 101 counties.

It is these figures which prompt public officials to describe the personal property tax in Illinois as a most onerous tax, impossible of fair administration.

This defendant has been advised by the State's Attorney of Rock Island County that, in spite of the decision which this petitioner is requesting this Court to review (ordering that personal property taxes be collected from individuals as well as corporations), Rock Island County (which is one of the larger counties in the state) will not make any attempt to collect personal property taxes from individuals.

As State Representative Harber Hall, a member of the Illinois House Revenue Committee, indicated at the public hearing on September 8, 1971, if the personal property tax situation is not remedied, there will be a taxpayers' revolt of major proportions.

The testimony of Maurice W. Scott containing the dollar amounts stated herein are contained in Appendix E, being a typewritten statement of his testimony before the House Revenue Committee on September 8, 1971.

The refusal of Rock Island County to collect the personal property tax is contained in a letter to this petitioner directed to the State's Attorney of Rock Island County under date of August 19, 1971, being Appendix F.

This Petitioner requests this Court to take judicial notice of the 1970 census figures for Cook County and the State of Illinois as compiled by the Federal Government.

Justice Davis in his dissent understated the case when he said:

“ * * * The evils and inequities in the administration of the personal property tax collections in this State are known to everyone. That these inequities apply with equal force to corporate taxpayers and individual taxpayers may, or may not, be totally true. The desire and purpose of systematically eliminating this archaic form of taxation is apparent from the actions of the people and the legislature of the State. The General Assembly, which drafted and adopted Senate Joint Resolution No. 30, had previously at the same legislative session already exempted from such taxation, household furniture and one automobile per household, used for personal pleasure. (Ill. Rev. Stat. 1969, ch. 120, par. 500.21a) The Article IX-A amendment was overwhelmingly ratified by the people of the State. The Constitution of 1970, likewise adopted by the vote of the people, expressed their concern over the form and use of personal property taxation. The newly-adopted constitution prohibits the reinstatement of any *ad valorem* personal property tax abolished before July 1, 1971, the effective date of the new constitution. This provision refers to the personal property tax as to individuals which was abolished by Article IX-A and the majority opinion runs counter to this constitutional prohibition in that it reinstates the personal property tax as to individuals. In addition, the new constitution provides that all *ad valorem* personal property taxes shall be abolished on or before January 1, 1979.

“The obvious spirit of the Article IX-A amendment, the will of the people, as expressed by its adop-

tion, and the intent and purpose of the legislature, should not be thwarted unless a construction to this effect is required. Thus, it is very appropriate that we consider the mischief sought to be remedied and the purpose to be accomplished by the Article IX-A amendment. (*Wolfson v. Avery*, 6 Ill. 2d 78, 88). Likewise, the court should memorialize the salutary rule of law that an amendment to a state constitution should be deemed violative of the Federal Constitution only where the asserted constitutional rights cannot otherwise be protected and effectuated. *Reynolds v. Simms*, 377 U.S. 533, 584, 84 S. Ct. 1362, —, 12 L. ed. 2d 506, 540."

So unenforceable within the terms and requirements of Section 1 of Article IX of the Illinois Constitution of 1870 was the assessment and collection of the personal property tax, that the Office of the Assessor of Cook County consistently distributed two forms: one for individuals who are proprietors or partners in unincorporated businesses, to include only property belonging to the business (designated as form No. 200B). For the individual listing property such as household goods and non-income-producing property, a separate form (No. 200A) was issued.

With this historical background, this Court's attention should be directed to the attempts of the electorate and the legislature to remedy the invidious discrimination that existed (and still exists as a result of the Illinois Supreme Court decision) in the assessment, enforcement and collection of the Illinois Personal Property Tax.

In 1969 the Illinois legislature passed a law which provides for the exemption of household goods and one automobile from the personal property tax. Ch. 120 § 500.21a Ill. Rev. Stat. 1969. At the same session of the Illinois

legislature, a joint resolution was drafted and adopted proposing Article IX-A as an amendment to the Illinois Constitution of 1870. That Article, its explanations and further clarifying resolutions of the General Assembly were as follows:

**"AMENDMENT
to the
CONSTITUTION OF ILLINOIS
THAT WILL BE SUBMITTED TO THE VOTERS
NOVEMBER 3, 1970**

This folder includes

**PROPOSED AMENDMENT TO THE
CONSTITUTION, EXPLANATION OF PROPOSED
AMENDMENT ARGUMENTS IN FAVOR OF
PROPOSED AMENDMENT
ARGUMENTS AGAINST
PROPOSED AMENDMENT
FORM OF BALLOT**

(Seal of the State of Illinois)

Published in compliance with Statute

by

PAUL POWELL

Secretary of State

"To the Electors of the State of Illinois:

At the general election to be held on the 3rd day of November, 1970, a blue ballot will be given to you and you will be called upon in your sovereign capacity as citizens to adopt or reject the following proposed amendment to the Constitution of Illinois.

**PROPOSED AMENDMENT TO ADD
ARTICLE IX-A**

(Prohibition of taxation of personal property by valuation as to individuals.)

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971."

"EXPLANATION OF AMENDMENT

(See Form of Ballot)

**ARGUMENTS IN FAVOR OF THE
PROPOSED AMENDMENT**

"The purpose of the proposed addition of Article IX-A to the Constitution is to abolish the unfair and unworkable taxation of personal property of individuals throughout Illinois.

The present taxation of personal property of individuals is unfair because:

"—It is not evenly administered, and cannot be. Variations in assessment practices from one assessing district to another are extreme, and result in unfair treatment of some taxpayers while others virtually escape any taxation of this kind. Individuals comprising about a third of the population of the State pay no personal property taxes whatever, while the rest pay taxes on their automobiles, on their household furniture, in some cases on their bank accounts and other financial resources, and, in rural areas, on their livestock, grain, farm implements, etc."

“—The taxation of personal property is a relic of the 19th century, when agriculture was the predominant occupation in the State, when a man's worth and ability to pay could be measured by his material possessions, when intangible assets were not at all common, and when personal property could not be easily hidden from assessors. Things are different today. Intangible assets are common, but not easily assessed and taxed. Thus, personal property taxation is now made, for the most part, of necessities of modern life such as family automobiles and a family's furniture.

“—Personal property taxation encourages cheating and evasion. Virtually every property taxpayer in the State perjures himself every year because he does not report all of his personal property to the assessor. This built-in feature of personal property taxation cannot be otherwise than to aid and abet the disintegration of the moral values of our society which we have cherished for so long and which we see slipping away day by day.”

“If adopted by the people of Illinois, this amendment to our Constitution will:

“—Remove the necessity of cheating on taxes, remove the impossible demands now placed on assessors to achieve fair taxation, and, above all, remove an onerous and universally despised tax program.

“—Modernize the revenue provisions of our Constitution, an objective of which the people of Illinois have indicated they are heartily in favor.

“The abolition of personal property taxation should be accomplished by constitutional reform. It should not be left to statutory action, which cannot be permanent in nature and which most certainly would lead to continuous court action and indecision as to exactly what was intended.

“Even the placing of this question on the ballot for the people to consider has been a powerful indication to Illinois' constitutional convention delegates that

the people prefer to end this unfair kind of taxation. At the time these arguments in favor of amending the Constitution were prepared, it could not be known what the constitutional convention's final decision on personal property taxation would be. But adoption of this amendment will indicate, once and for all time, that the people are fed up with unfair taxation.

"The loss of revenue to local governments in Illinois if personal property taxation of individuals is abolished will be considerable, to be sure. But modernization of our entire tax system will make possible replacement of this needed revenue through other, fairer, sources.

"In short, there is no compelling argument which can now be raised against adoption of this amendment. And there is every reason to support it."

"ARGUMENTS AGAINST THE PROPOSED AMENDMENT

"There is no question of the dissatisfaction with the taxation of personal property at present in Illinois. It is discriminatory, it is unfair, it is almost impossible to administer, and it is economically unsound. But the same can be said of the proposed amendment, and moreover the amendment, if adopted, could be injurious to the finances of local governments because it makes no provision for the replacement of the lost revenues.

"—It is discriminatory because it creates a tax liability based on the nature of the ownership of property and not because of the nature of the property itself. That which is owned by or held in a fiduciary capacity for the benefit of natural persons is exempted from taxes; that which is owned by corporations, etc., is subject to taxes. How will this affect a piece of equipment still titled to the original owner,

a corporation, while the user makes payments on it? Business interests generally will be at a disadvantage under this amendment.

“—It is unfair because it gives no relief to merchants and manufacturers whose inventories are now subject to tax, depending on the practice of the assessor in their locale, so that they may be at a competitive disadvantage with merchants elsewhere and, in the case of industry, with out-of-state manufacturers.

“—It will be almost impossible to administer the amended tax equally because the location of some kinds of personalty, such as shares of intangibles not owned by individuals, which can be shifted out of the State, but this is not true for tangible personalty—machinery, equipment, etc.—owned by a corporation.

“—It is economically unsound because it places a burden on the corporate form of business organization. Under the new State income tax law, corporations are taxed at a higher rate than individuals; why should they be subjected to the continued personal property tax when individuals are not?

“—It will be injurious to local governments because no provision is made to replace the lost revenue. It is estimated that from 6 to 7 percent of all property on the tax rolls now falls in the class of individually owned personal property that will be exempted. Where will this loss of revenue (about \$140,000,000) be made up? By raising real estate taxes? The income tax proceeds are being shared with cities and counties; what about other types of local governments? How will they make up the difference?

“The amendment should be defeated. The only useful purpose it can serve is to induce the Constitutional Convention to provide a fair, equitable, and administratively sound tax system, with an allocation of revenues to local governments to replace any loss

from discontinuing or modifying the present system of personal property taxation."

"FORM OF BALLOT

PROPOSED AMENDMENT TO ADD ARTICLE IX-A

(Prohibition of taxation of personal property by valuation as to individuals.)

EXPLANATION OF AMENDMENT

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870. Article IX-A, thus setting aside existing provisions in Article IX, section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations.

"Place an X in blank opposite "Yes" or "No" to indicate your choice.

- () YES For the proposed amendment to add Article IX-A to the Constitution. (Prohibition of taxation of personal property by valuation as to individuals.)"
- () NO

**"CAPITOL BUILDING
SPRINGFIELD, ILLINOIS**

OFFICE OF THE SECRETARY OF STATE

"I, PAUL POWELL, Secretary of State of the State of Illinois, do hereby certify that the foregoing contains a true and correct copy of the proposed amendment, the explanation of the proposed amendment, the arguments in favor of the proposed amendment, the arguments against proposed amendment and the

form in which said amendment will appear upon a separate blue ballot pursuant to Senate Joint Resolution No. 30 of the Seventy-sixth General Assembly, the original of which is on file in this office.

"IN WITNESS WHEREOF, I here-
 unto set my hand and affix the Great
 Seal of the State of Illinois. Done at
 my office in the Capitol Building in
 the city of Springfield this 27th day
 of February A.D. 1970, and of the
 Independence of the United States
 the one hundred and ninety-fourth.

PAUL POWELL,
Secretary of State"

(SEAL)

At the general elections in November of 1969, Article IX-A as an amendment to the Illinois Constitution of 1870 was overwhelmingly ratified by the people of the State of Illinois by a ratio of between eight or seven to one. At a general election on December 15, 1970, the people of the State of Illinois ratified the Illinois Constitution of 1970, which contained a revenue article which provides as follows:

"SECTION 1. STATE REVENUE POWER.

The General Assembly has the exclusive power to raise revenue by law except as limited or otherwise provided in this Constitution. The power of taxation shall not be surrendered, suspended, or contracted away.

**"SECTION 2. NON-PROPERTY TAXES—
 CLASSIFICATION, EXEMPTIONS,
 DEDUCTIONS, ALLOWANCES
 AND CREDITS.**

In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class

shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

"SECTION 3. LIMITATIONS ON INCOME TAXATION.

(a) A tax on or measured by income shall be at a non-graduated rate. At any one time there may be no more than one such tax imposed by the State for State purposes on individuals and one such tax so imposed on corporations. In any such tax imposed upon corporations the rate shall not exceed the rate imposed on individuals by more than a ratio of 8 to 5.

"(b) Laws imposing taxes on or measured by income may adopt by reference provisions of the laws and regulations of the United States, as they then exist or thereafter may be changed, for the purpose of arriving at the amount of income upon which the tax is imposed."

"SECTION 4. REAL PROPERTY TAXATION.

(a) Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.

(b) Subject to such limitations as the General Assembly may hereafter prescribe by law, counties with a population of more than 200,000 may classify or to continue to classify real property for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class. The level of assessment or rate of tax of the highest class in a county shall not exceed two and one-half times the level of assessment or rate of tax of the lowest class in that county. Real property used in farming in a county shall not be assessed at a higher level of assessment than single family residential real property in that county.

(c) Any depreciation in the value of real estate occasioned by a public easement may be deducted in assessing such property."

"SECTION 5. PERSONAL PROPERTY TAXATION.

(a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.

(b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.

(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes shall not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3(a) of this Article."

"SECTION 6. EXEMPTIONS FROM PROPERTY TAXATION.

The General Assembly by law may exempt from taxation only the property of the State, units of local governmental and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes. The General Assembly by law may grant homestead exemptions or rent credits.

"SECTION 7. OVERLAPPING TAXING DISTRICTS.

The General Assembly may provide by law for fair apportionment of the burden of taxation of property situated in taxing districts that lie in more than one county.

"SECTION 8. TAX SALES.

(a) Real property shall not be sold for the non-payment of taxes or special assessments without judicial proceedings.

(b) The right of redemption from all sales of real estate for the non-payment of taxes or special assessments shall exist in favor of owners and persons interested in such real estate for not less than two years following such sales. Owners, occupants and parties interested shall be given reasonable notice of the sale and the date of expiration of the period of redemption as the General Assembly provides by law."

"SECTION 9. STATE DEBT.

(a) No State debt shall be incurred except as provided in this Section. For the purpose of this Section, "State debt" means bonds or other evidences of indebtedness which are secured by the full faith and credit of the State or are required to be repaid, directly or indirectly, from tax revenue and which are incurred by the State, any department, authority, public corporation or quasi-public corporation of the State, any State college or university, or any other public agency treated by the State, but not by units of local government, or school districts.

(b) State debt for specific purposes may be incurred or the payment of State or other debt guaranteed in such amounts as may be provided either in a law passed by the vote of three-fifths of the members elected to each house of the General Assembly or in a law approved by a majority of the electors voting on the question at the next general election fol-

lowing passage. Any law providing for the incurring or guaranteeing of debt shall set forth the specific purposes and the manner of repayment.

(c) State debt in anticipation of revenues to be collected in a fiscal year may be incurred by law in an amount not exceeding 5% of the State's appropriations for that fiscal year. Such debt shall be retired from the revenues realized in that fiscal year.

(d) State debt may be incurred by law in an amount not exceeding 15% of the State's appropriations for that fiscal year to meet deficits caused by emergencies or failures of revenue. Such law shall provide that the debt be repaid within one year of the date it is incurred.

(e) State debt may be incurred by law to refund outstanding State debt if the refunding debt matures within the term of the outstanding State debt.

(f) The State, departments, authorities, public corporations and quasi-public corporations of the State, the State colleges and universities and other public agencies created by the State, may issue bonds or other evidences of indebtedness which are not secured by the full faith and credit or tax revenue of the State nor required to be repaid, directly or indirectly, from tax revenue, for such purposes and in such amounts as may be authorized by law."

"SECTION 10. REVENUE ARTICLE NOT LIMITED.

This Article is not qualified or limited by the provisions of Article VII of this Constitution concerning the size of the majorities in the General Assembly necessary to deny or limit the power to tax granted to units of local government."

The instant case is a consolidation of three separate law suits. The first was a case entitled *Lake Shore Auto Parts Co., an Illinois corporation, et al. v. Bernard J. Korzen, County Collector of Cook County, et al.* (Appen-

dix B). In this case the attack was not upon the constitutionality of Article IX-A, but upon the effect it had upon the Revenue Article of the State of Illinois as it pertained to assessment and collection of personal property taxes. Judge Dahl, in his memorandum decision held that the removal of personal property taxes from individuals and not from corporations rendered the revenue act unconstitutional and that no personal property taxes could be collected.

Subsequently, an original action was filed in the Illinois Supreme Court entitled *Eugene L. Maynard, et al. v. Edward J. Barrett, County Clerk of Cook County, et al.* This action challenged the constitutionality and validity of the amendment to the Illinois Constitution of 1870 designated as Article IX-A.

Subsequently, a third action was instituted in the Circuit Court of Cook County entitled *Clemens K. Shapiro, et al. v. Edward J. Barrett, County Clerk of Cook County et al.* In this case, Judge Donovan ruled that Article IX-A, being an amendment to the Illinois Constitution of 1870 was constitutional and exempted from personal property taxation only such personal property owned by individuals that was used for their personal enjoyment and that of their families. (Appendix C).

These three actions were consolidated for hearing by the Illinois Supreme Court and that Court on July 9, 1971 rendered its decision (Appendix A), finding that Article IX-A, being an amendment to the Illinois Constitution of 1870, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The effect of this decision was to reimpose the original Article IX of the Illinois Constitution of 1870 and to reinstate personal property taxes on both individuals and other legal entities, including corporations.

ARGUMENT

I.

IT IS IMPROPER TO HOLD A STATUTE OR CONSTITUTIONAL PROVISION UNCONSTITUTIONAL WHEN THERE IS AN ALTERNATIVE, REASONABLE BASIS FOR HOLDING IT CONSTITUTIONAL

This Petitioner submits that the court below ignored the basic rule of statutory construction that a court will not opt for an interpretation which will render a statute unconstitutional if there is any fair reading of it which would keep it within the framework of the Constitution. *U. S. v. Cohn Grocery Co.*, 255 U.S. 81, _____ (1920). In *Flemming v. Nestor*, 363 U.S. 603; 80 S. Ct. 1367; 4 L. Ed. 2d 1435 (1960), this Court stated:

“We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute’s setting which will invalidate it over that which will save it. ‘[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void.’ ” *Fletcher v. Peck* (U.S.) 6 Cranch 87, 128, 3 L. Ed. 162, 175. 363 U.S. 617.

In *U.S. v. National Dairy Products Co., et al.*, 372 U.S. 29; 84 S. Ct. 594; 9 L. Ed. 2d 561, reh. den. 372 U.S. 961; 83 S. Ct. 1011; 10 L. Ed. 2d 13 (1963), this Court stated:

"The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. E.g., *Jordan v. DeGeorge*, 341 U.S. 223, 231, 95 L. Ed. 886, 892, 71 S. Ct. 703 (1951), and *United States v. Petrillo*, 332 U.S. 1, 7, 91 L. Ed. 1877, 1882, 67 S. Ct. 1538 (1947). Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation."

(Citations omitted.)

It is submitted that an amendment to the Constitution of the State of Illinois overwhelmingly ratified by the electorate is entitled to be treated and considered under the same basic rule of statutory construction; that the Court will not opt for an interpretation which will render the constitutional amendment unconstitutional under the Constitution of the United States.

Justice Davis in his dissent found a reasonable alternative to finding Article IX-A (the amendment to the Constitution of the State of Illinois of 1870) unconstitutional. It is further submitted that the decision of Judge Donovan in the *Shapiro* case (App. C), found an alternative ground on which to sustain the validity of this constitutional amendment. It is submitted that the majority of the court below strained to find a basis for holding Article IX-A unconstitutional and departed from their own pronouncements (see *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E. 2d 633 (1969), that there is a reasonable basis to distinguish between corporations and individuals.

II.

THE COURT HAS CONSISTENTLY GRANTED STATE LEGISLATURES BROAD POWERS IN ADOPTING SCHEMES OF STATE TAXATION AND THE COURT BELOW ERRED IN FINDING THAT ARTICLE IX-A OF THE ILLINOIS CONSTITUTION OF 1870 VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Before calling on the specifics of this Petitioner's argument, Petitioner suggests to this Court that it should consider the numerous decisions in which it has been called upon during the past century to pass upon the constitutionality of taxing schemes of the various states of this Union. The decision of the majority of the court below recognized the flexibility which this Court has granted to the states in adopting schemes of taxation and stated in its opinion:

"The Supreme Court of the United States has thus described the governing principles:

"Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237; *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 293;

* * * *State Board of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537, 540, 543, 75 L. Ed. 1248. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co. v. Conway*, supra, 281 U.S. at 159.

'But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of legislation.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37; *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 231 U.S. 146, 160 * * *.'

Allied Stores of Ohio, Inc. v. Bowers, (1959), 358 U.S. 522, 526-27, 79 S. Ct. 437, 3 L. Ed. 2d 480, 484-85. (Appendix A, p. A12-13).''

It is interesting to note that the majority decision cited *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), and yet apparently ignored its significance. Of the cases cited by the majority, this is one of the few arising out of *ad valorem* personal property taxes.

An Ohio statute taxed the property of Ohio residents stored in Ohio warehouses, but allowed the property of non-residents of Ohio to be stored free.

The Court, speaking through Justice Whittaker, held this statute not to be a denial of equal protection because the Court could assume that the statute was enacted to

encourage out-of-state investment, a valid purpose for classification.

"We cannot assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy of the State. What were the special reasons, motives or policies of the Ohio Legislature for adopting the questioned proviso we do not know with certainty, *Southwestern Oil Co. v. Texas*, 217 U.S. 114, 126, for a state legislature need not explicitly declare its purpose. But it is obvious that it may reasonably have been the purpose and policy of the State Legislatures, in adopting the proviso, to encourage the construction or leasing and operation of warehouses in Ohio by nonresidents with the attendant benefits to the State's economy, or to stimulate the market for merchandise and agricultural products produced in Ohio by enabling nonresidents to purchase and hold them in the State for storage only, free from taxes in anticipation of future needs." (358 U.S., p. 528).

Justice Brennan, joined by Justice Harlan, wrote a separate concurring opinion stressing his belief that the Equal Protection Clause is "an instrument of federalism" and allows each state to experiment with its tax laws. Justice Stewart did not take part in the decision.

It is noteworthy that neither opinion discussed the contention (apparently made in Allied Stores' brief) that Ohio could not classify property for taxation on the basis of "residence of the owner." The majority decision also appears to have ignored the judgment of this Court in *Ohio Oil Co. v. Conway*, 74 L. Ed. 775; 281 U.S. 146 (1930), wherein this Court stated:

"When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guaranties of the Federal Constitution, the states have the attribute of

sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the 14th Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may tax real and personal property in a different manner. It may grant exemptions. The state is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the 14th Amendment was intended to assure." (281 U.S. at 159).

It is submitted that the issues in this case are: (1) Was the majority of the Illinois Supreme Court correct when it held that any distinction between individuals and corporations with the imposition of *ad valorem* personal property taxes was an invidious and unreasonable distinction; (2) Was Justice Davis correct in his dissent when he held that it was reasonable to distinguish between all individually owned personal property as against all corporately owned personal property; or (3) Was Judge Donovan in error when he ruled that it is reasonable to exempt from the *ad valorem* personal property taxes "the personal property owned by individuals and used for their personal enjoyment and that of their families" and had to continue the tax upon the property of

individuals, partnerships and corporations which is used for business and profit making purposes. Petitioner respectfully submits that either the dissent of Justice Davis or the decision of Judge Donovan are reasonable interpretations of the amendment (Article IX-A) to the Illinois Constitution of 1870 and fall clearly within the basic rule of statutory construction that this Court will not adopt an interpretation which would render a statute unconstitutional, as either of those decisions would keep this amendment within the framework of the Constitution of these United States (see *U.S. v. Cohn Grocery Co., supra.*).

III.

THE COURT BELOW ERRED IN FINDING THAT ARTICLE IX-A OF THE ILLINOIS CONSTITUTION OF 1870 CREATED AN INVIDIOUS DISCRIMINATION AND, THEREFORE, VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The majority decision apparently holds that to classify property solely on the basis of ownership creates an invidious discrimination and is, therefore, unconstitutional. This Petitioner suggests that this ruling is directly contrary to the Court's decision in *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E. 2d 633 (1969), where the Supreme Court of Illinois held that classification of corporations as opposed to individuals was reasonable.

It is submitted that if a classification, whether it be for tax purposes or for any other purpose, conforms with the constitutional requirements of fairness and reason-

ableness and does not violate principles of due and equal protection, then that classification is unimpeachable. *Cipriano v. City of Houma*, 286 F. Supp. 823, (1965), *Edelen v. Hogsett*, 254 N.E. 2d 435, 44 Ill. 2d 215, (1969).

The notion that a legislature may make distinctions and classifications for taxation purposes is a fundamental precept. In *New York Rapid Transit Corporation v. City of New York* and its companion case, *Brooklyn E. Queens Transit Corp. v. City of New York*, 303 U.S. 573, 82 L. Ed. 1024 (1937), the U. S. Supreme Court declared that a state may subject a corporation to a separate or higher income tax than individuals or other corporations. In that case, Mr. Justice Reed, in handing down the court's decision, stated:

" . . . A state may exercise a wide discretion in selecting the subjects of taxation, particularly as respects occupation taxes." (303 U.S. at 578).

The Illinois General Assembly possesses plenary power over taxation, which power has never been limited by either the state or federal constitutions. Pursuant to that power of taxation, the Illinois legislature may promulgate certain classifications which will derogate from one class and be beneficial to another. This classification process is not *per se* unconstitutional. It is only unconstitutional when the classification effects an invidious discrimination to one party.

There may be a reason for exempting one party from a tax and subjecting another class to taxation. The reasons adduced may be that one class is better able to bear the onus of taxation than another class. The classification will stand if it does not infringe on due process and equal protection and the classification is adapted to secure the purposes which the legislature intended. *Father Basil's*

Lodge v. City of Chicago, 393 Ill. 246, 65 N.E. 2d 805 (1947), *Suskin v. Nixon*, 304 F. Supp. 71 (1969). In *Faustino v. Immunization and Naturalization Service*, 302 F. Supp. 212, the U. S. District Court declared:

"Where the statutory classification is patently established to accomplish a known purpose, which purpose is properly within plenary power of the legislature, attack upon that classification must fail as not presenting a substantial constitutional question, unless classification can be shown to constitute 'invidious discrimination' or to be 'patently arbitrary' or 'utterly lacking in rational justification'." (302 F. Supp. at 215).

IV.

THE COURT BELOW ERRED IN HOLDING THAT TO DISTINGUISH BETWEEN INDIVIDUALS AND CORPORATIONS WAS AN INVIDIOUS AND UNREASONABLE DISCRIMINATION.

This Petitioner urges this Court to carefully consider the judgments of Judge Dahl in the *Lake Shore Auto Parts* case (Appendix B), of Judge Donovan in the *Shapiro* case (Appendix C), and the dissenting opinion of Justice Davis in the three consolidated cases (Appendix A). Petitioner submits that the dissent is compatible and in accord with the opinion of the Attorney General of the State of Illinois submitted to this Petitioner under date of January 22, 1971 (Appendix D). To attempt to add to or in any way embellish upon the reasoning and logic contained in Justice Davis' dissent would be akin to carrying coals to Newcastle.

The Supreme Court of the State of Illinois has repeatedly held that it would, if reasonably possible, so construe a statute attacked on constitutional grounds as to promote

its essential purposes and render it constitutional, in preference to a construction which would invalidate it or raise doubts as to its validity.

Baro v. Murphy, 32 Ill. 2d 453, 462, 207 N.E. 2d 593 (1965); *Time, Inc. v. Hulman*, 31 Ill. 2d 344, 353, 201 N.E. 2d 374 (1964); *People ex rel. Moss v. Pate*, 30 Ill. 2d 271, 274, 195 N.E. 2d 641 (1964); *People v. Nastasio*, 19 Ill. 2d 524, 529, 168 N.E. 2d 728 (1960); *People v. Ill. Toll Highway Comm.*, 3 Ill. 2d 218, 233-234, 120 N.E. 2d 35 (1954); *People v. Dale*, 406 Ill. 238, 247, 92 N.E. 2d 761 (1950).

The rules of constitutional and statutory construction are essentially the same. [*People v. Hutchinson*, 172 Ill. 486, 497, 50 N.E. 599 (1898); *American Aberdeen-Angus Breeders' Assn. v. Fullerton*, 325 Ill. 323, 328, 156 N.E. 314 (1927)]. As stated by the Court in *Wolfson v. Avery*, 6 Ill. 2d 78, 94, 126 N.E. 2d 701 (1955):

"If there is any distinction between the rules governing the construction of constitutions and the rules that apply to statutes, less technical ones are applied in construing constitutions. (*People ex rel. Rogerson v. Crawley*, 274 Ill. 139, 142). A constitutional guaranty should be interpreted in a broad and liberal spirit. Courts should not apply so strict a construction as to exclude its real object and intent."

The Illinois Supreme Court has established the following propositions: (a) that the Illinois Constitution is to be liberally construed; (b) that the meaning of constitutional language is best ascertained by considering the purposes of a disputed provision; (c) that such a provision should be construed to give effect to the spirit in which it was adopted; (d) that narrow, technical reasoning should not be applied; and (e) that which is within the intention is within the statute, though not within

the letter, and though within the letter, it is nevertheless not within the statute if not likewise within the intention. *Wolfson v. Avery*, *supra*, at 93-94 (1955); *People ex rel. Rogerson v. Crawley*, 274 Ill. 139, 142-143, 113 N.E. 119 (1916); *People v. Vickroy*, 266 Ill. 384, 390, 107 N.E. 638 (1915); *People ex rel. Gaines v. Garner*, 47 Ill. 246, 253 (1868); *People ex rel. Stickney v. Marshall*, 6 Ill. 672, 682, 689 (1844).

In construing a constitutional amendment, the Illinois Supreme Court reads it as a whole and attributes "to each part a meaning that is consistent and harmonious with the amendment's overall intendment and purpose" * * * to avoid whenever possible "irrational, absurd or unjust consequences." *People ex rel. Giannis v. Carpenter*, 30 Ill. 2d 24, 28, 29, 195 N.E. 2d 665 (1964).

Since the language to be construed is a constitutional provision, the object of inquiry is the understanding of the voters who adopted the instrument. [*Wolfson v. Avery*, *supra*, at 88; *City of Beardstown v. City of Virginia*, 76 Ill. 34, 41 (1875), mod. on reh. 81 Ill. 541 (1876).] It is the people's intent which must be determined.

The Court below was not required to seek the voters' subjective intentions but it may rule upon extrinsic evidence of intent. A court may look for a determination of proper construction to prior and contemporaneous acts, reasons for the provision in question, mischiefs intended to be remedied, the purposes intended to be accomplished, and the like. *Hamilton v. Rathbone*, 175 U.S. 414, 419, 20 S. Ct. 155 (1899).

"In this connection it is appropriate to consider the historical background for the inclusion of . . . (the constitutional provision) and the debates of the members of the convention, as well as explanations of the pro-

vision published at the time." *Wolfson v. Avery, supra*, at 88.

Petitioner contends that a constitutionally permissive interpretation of Article IX-A clearly emerges from a consideration of the interpretative aids sanctioned by the Illinois Supreme Court; particularly that Article IX-A does not violate the equal protection clause of the Fourteenth amendment to the Federal Constitution.

This Petitioner is somewhat bewildered by the majority decision of the Illinois Supreme Court in the instant case. While they reversed the opinion of Judge Dahl in the *Lake Shore* case, wherein he threw out the entire personal property tax, they seemingly agreed with his rationale when they reinstated the tax upon both individuals and corporations. The Court appears to have been unmindful of the fact that in *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E. 2d 633, they, themselves, had found a valid distinction between corporations and individuals on which to base a discrimination. The reimposition by the Illinois Supreme Court of personal property taxes on individuals appears to have been a "gut reaction" to the financial disaster that would have resulted from the affirmance of Judge Dahl's decision.

It is a matter of public record that real estate and personal property taxes are the basis of the funding of the Illinois Public School system. It is estimated that to have upheld Judge Dahl's decision, the loss of revenue to the local units of government in the State of Illinois would have been approximately \$300,000,000. It is a matter of public record that with all the revenue available, the public school system in the State of Illinois is teetering on the brink of financial disaster. This Petitioner submits that the financial disaster that may well have ensued

from an affirmance of Judge Dahl's decision was not sufficient reason for the Illinois Supreme Court to hold that to draw a distinction for purposes of taxation between individuals and corporations results in an invidious and unreasonable discrimination and to then go on and reimpose personal property taxes on individuals and corporations.

As Justice Davis stated in his dissent:

"The Supreme Court in *Lawrence* (*Lawrence v. State Tax Commission of Miss.*, 286 U.S. 276, 284, 285; 52 S. Ct. 556, 559; 79 L. Ed. 1102, 1108) also stated that there is no constitutional requirement that a system of taxation should be uniform as applied to individuals and corporations, regardless of the circumstances in which it operates, (286 U.S. 276, 283, 52 S. Ct. 556, 558, 76 L. Ed. 1107), and we have just recently held that for the purpose of income taxation, corporations may be placed in one class and individuals in another and each taxed differently. (*Thorpe v. Mahin*, 43 Ill. 2d 36.) The language of the court at pages 45 and 46 is worthy of repetition:

'It is next contended that the Act violates the uniformity provision of section 1 of article IX of our constitution and the equal-protection and due-process requirements of the fourteenth amendment to the United States constitution by creating multiple classes and discriminating unreasonably among them. This contention is advanced specifically against the provisions which tax corporations at a 4% rate and individuals, trusts, and estates at 2½% rate.

'Both the equal-protection argument and the uniformity argument depend on the reasonableness of putting corporations in one class and individuals, trusts, and estates in another class for purposes of this tax. (See *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289). When the due-process contention has been

advanced, this court, citing Supreme Court cases, has stated: 'It has long been settled that the power of the legislature to make classifications, particularly in the field of taxation, is very broad, and that the fourteenth amendment imposes no "iron rule" of equal taxation. (Citations.) The reasons justifying the classification, moreover, need not appear on the face of the statute, and the classification must be upheld if any state of facts reasonably can be conceived that would sustain it. (Citations.) The burden therefore rests on one who assails the statute to negate the existence of such facts. (Citations.)' *Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 489-490.

'When the uniformity contention has been advanced this court has stated: 'It is well established that the legislature has broad powers to establish reasonable classifications in defining subjects of taxation. * * * Such classification must, however, be based on real and substantial differences between persons taxed and those not taxed. (Citations.)' (*Klein v. Hulman*, 34 Ill. 2d 343, 346-347.) 'In order to prevail on an allegation that a statute or portion of a statute is unconstitutional, the plaintiff has the burden of showing how the legislature has violated the constitution.' *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289, 291.'

'In short, petitioners have the burden of showing that the challenged classification is unreasonable. Their only assertion is that 'corporations are at a disadvantage when they compete in the same type of business with individual proprietorships or partnerships because of the rate differential.' This assertion has been rejected by the Supreme Court as to a Federal tax (*Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed. 389), and as to a State tax (*Fort Smith Lumber Co. v. Arkansas ex rel. Arbuckle*, 251 U.S. 532, 40 S. Ct. 304, 64 L. Ed. 396), and by this court (*People v. Franklin National*

Insurance Co. of New York, 343 Ill. 336; *Michigan Millers Mutual Fire Insurance Co. v. McDonough*, 358 Ill. 575), where, for purposes of the tax in question, corporations were placed in one class and individuals in another and each were taxed differently.

"The majority, however, holds that as to a property tax the classification for exemption or taxation may not be based upon the character of the ownership, but only upon the nature of the property itself. Thus, the majority is of the opinion that the classification may not be based upon the corporation—individual distinctions which we upheld in *Thorpe*." (App. A 18-20)

In view of the fact that at the November 3, 1970 general election the voters of this State adopted Article IX-A as an amendment to the Constitution of the State of Illinois of 1870 by an overwhelming majority, Petitioner wonders how many of the Illinois Supreme Court Justices themselves voted "Yes" in November of 1970 and "No" the following July.

For many years prior to the effective date of the Illinois Constitution of 1970, the legislature of this state has struggled to fashion a system of taxation that would meet the strains and stresses created as this state shifted from a rural agricultural state to a highly industrialized and commercial state. The framework within which the legislature had to work in the field of revenue was the Revenue Article of the Constitution of 1870. During the years many attempts had been made to release the legislature from the stringent requirements imposed by Article IX of the Constitution of 1870.

The public, which resisted any change or relaxation of the stringent requirements, feared not a difference in the treatment for individuals as against corporations in the

assessment and collection of personal property taxation, for it well knew that in practice the personal property taxes were not being assessed on an equal basis either as between the urban individuals as against the suburban and rural individuals, or as against all individuals vs. corporations.

In *Bachrach, et al. v. Nelson, et al.*, 349 Ill. 579, 182 N.E. 909 (1932), the Court considered the Income Tax Act that had been passed by the legislature in 1932. The plaintiffs had asserted that the Act was unconstitutional on several bases. The Court, at 349 Ill. 582, stated:

"It is admitted by the Attorney General, in behalf of appellants, that if any one of three fundamental objections raised by appellees against the constitutionality of the present law is sound, then no satisfactory income tax legislation can be passed under our present conditions."

The Court then went on to find the tax unconstitutional under Article IX of the Constitution of 1870.

The belief on the part of the public that no income tax in Illinois would meet the constitutional standards, was shattered when the Illinois Supreme Court rendered its decision in the *Thorpe* case, *supra*, finding that not only was the income tax constitutional, but that the tax could be imposed at different rates upon individuals as against corporations.

With the income tax held valid, the legislature and electorate proceeded to try and untangle the inequities that existed under the personal property tax. The Illinois Supreme Court had consistently recognized the inequities, that were inherent in the Illinois tax laws and the impossibility of fairly administering such laws, and had recognized that those problems would not readily lend themselves to judicial solution.

It seems incongruous that after years of recognizing that the uniformity provision of Article IX was, in all probability, an ideal beyond attainment; having recognized that the laws were being improperly administered; the Court still refused to take action. In *People ex rel. Hamer v. Jones*, 39 Ill. 2d 360, 367, 372; 235 N.E. 2d 589 (1968), the Court stated:

"This assessment and valuation of taxable property thereunder has created vexatious problems and serious difficulties. Although the law has directed full value assessment, *de facto* debasement has occurred. In 1940, it was noted in *Mobile and Ohio Railroad Co. v. State Tax Commission*, 374 Ill. 75 when, on page 76 thereof, the court said: "By virtue of a recognized custom, property, generally, throughout the State of Illinois is now, and for many years last past has been, assessed for taxation at a figure less than its full cash value and this custom has long been recognized by the State Tax Commission." It was conceded that the enforcement of the uniformity requirements of the constitution was an old and continuing problem in the court and with the legislature, and that it could not be truthfully said that either branch of government had ever yet arrived at a satisfactory solution. The court reasoned that the ideal might be beyond attainment through available human agencies, but that the quest could not be abandoned either by the legislature or the judicial branch of government. It concluded with the statement that "The problem is administrative rather than legislative or judicial, and the administrative difficulties have so far proved insurmountable insofar as any exact attainment of the desired end is concerned." 374 Ill. at 83."

* * *

"Despite this holding, however, we feel compelled to disclose our awareness of the fact that problems of property tax are a constant source of legislation and where they have been insurmountable the method has

been supplemented or abandoned. While it has been pointed out that the complaint here is insufficient, it is a matter of common knowledge, that the property tax, as administered, has lost considerable face. It is far from a perfect, or even satisfactory, solution to the problem of providing revenue on an equitable basis. The property tax method was devised long before the present day complexities of urban living and the increased demands made upon government. The intricacies of the problem do not readily lend themselves to judicial solution.

"In this latter regard, we stated in *Hall v. Gillins*, 13 Ill. 2d 26, at page 32, 147 N.E. 2d 352, at page 355: 'The point of greatest concern has been the subject of frequent legislative attention. Further legislative action appears likely, and the likelihood of legislative action has always militated against judicial change.' But, while we may defer to legislative action for a time, we cannot abdicate our responsibilities even though *our approach must necessarily be a negative one* and chaos may ensue." 39 Ill. 2d 360 at 372. (Emphasis added.)

It is submitted that the legislature and the electorate in approving Article IX-A as an amendment to the Illinois Constitution of 1870 sought to free the legislature from the strait-jacket of uniformity. Why, then, does the Court now reimpose the strait-jacket?

It is respectfully suggested that in the instant proceeding, the Supreme Court recognized that to affirm the decision of Judge Dahl would have created a chaotic situation. The majority decision of the court, however, appears to ignore that the amendment to the Constitution of 1870, designated as Article IX-A, was designed to remove the stringent requirements of uniformity that the prior Revenue Article contained. The Court, by its decision in the instant case, thwarts the intent of the legislature and the

will of the electorate by resolving this difficult and vexatious issue by judicial solution. Apparently, as Justice Davis pointed out in his dissent, the Court ignored the rationale of its decision in the *Thorpe* case.

As this Petitioner has suggested, the basic reasoning and rationale adopted by the Supreme Court in the majority decision is substantially indistinguishable from the rationale relied upon by Judge Dahl in the *Lake Shore* case. The only substantial difference in the two decisions is the result reached. Both hold that to impose the burden of *ad valorem* personal property taxes on property owned by "A," and remove it from property owned by "B" is unconstitutional. Neither court recognized that the Supreme Court in *Thorpe v. Mahin, supra*, had reasoned that sufficient differences inhered in corporations as opposed to individuals to justify different income tax rates.

To this point this Petitioner has concentrated on the infirmities inherent in the decision of Judge Dahl and the decision of a majority of the Illinois Supreme Court, and has not pointed out the reasonableness of the decision of Judge Donovan in the third of the consolidated cases (Appendix A33-40).

Concededly, Judge Donovan found there was a discrimination between individuals and the personal property that they used solely for their personal enjoyment and that of their families, and that of all other personal property whether owned by individuals or corporations, for the purpose of engaging in business and acquiring profits.

As a reasonable man, Judge Donovan found *that* to be a reasonable discrimination. Only unreasonable discriminations, those that are invidious, are unconstitutional. *Metropolis Theater Co. v. Chicago*, 246 Ill. 20, aff'd. 228 U.S. 61 (1913); *Doolin v. Korshak*, 39 Ill. 2d 521; 236 N.E. 2d 897 (1968).

This Petitioner respectfully submits that either the dissenting opinion of Justice Davis was correct, or that the decision of Judge Donovan in the *Shapiro* case was correct.

CONCLUSION

It is incumbent upon this Court to grant the petition prayed for and to reverse the decision of the majority of the Illinois Supreme Court, a decision that may well breed a taxpayers' revolt of catastrophic proportions that conceivably could bring the State of Illinois to disaster. Petitioner submits that this Court should take judicial notice that because of the burgeoning rate of the cost of local government, as well as the cost of federal government, that this Union may not celebrate its bicentennial.

For the reason stated above, this defendant respectfully prays that this Court grant the writ herein prayed for.

Respectfully submitted,

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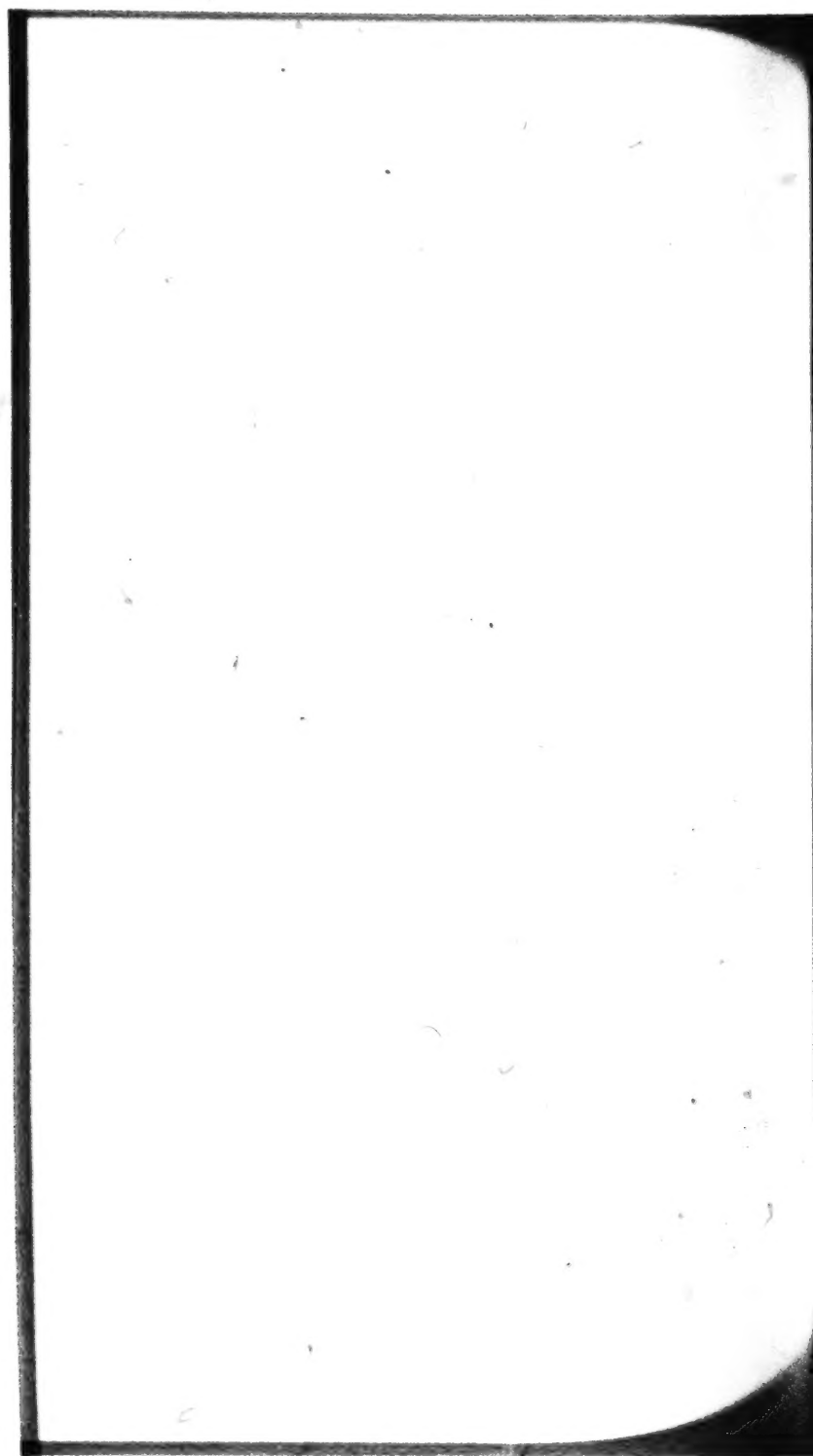
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APPENDIX "A"

LAKE SHORE AUTO PARTS CO.,
an Illinois Corporation, et al.,

Appellees,

v.

BERNARD J. KORZEN, County
Treasurer and ex officio County Col-
lector of Cook County, et al.,

Appellants.

EUGENE L. MAYNARD, et al.,

Plaintiffs,

Nos. 44199, 44308,
44432 Cons.

v.

EDWARD J. BARRETT, County
Clerk of Cook County, et al.,

Defendants.

CLEMENS K. SHAPIRO, et al.,

Appellants,

v.

EDWARD J. BARRETT, County
Clerk of Cook County, et al.,

Appellees.

Mr. JUSTICE SCHAEFER delivered the opinion of
the court.

These consolidated cases present issues concerning the
construction and the validity of Article IX-A which was
added to the Constitution of 1870 by referendum vote at
the November 1970 election. On June 30, 1969, the Sen-
ate and the House of Representatives concurred in the

adoption of Senate Joint Resolution No. 30, which provided for the submission of the proposed amendment to a referendum vote. Senate Joint Resolution No. 30 (Senate Journal, June 30, 1969, p. 3476) is as follows:

SENATE JOINT RESOLUTION NO. 30

Resolved, By the Senate of the Seventy-sixth General Assembly of the State of Illinois, the House of Representatives concurring herein, that there shall be submitted to the electors of the State for adoption or rejection at the next election of members of the General Assembly of the State of Illinois, in the manner provided by law, a proposition to add Article IX-A to the Constitution, the added Article to read as follows:

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971.

The explanation of the amendment which appeared upon the referendum ballot is as follows:

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions in Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

Subsequently, on May 19, 1970, the Senate adopted Senate Joint Resolution No. 67 (Senate Journal May 19, 1970,

p. 6) which contained a further statement of the intention of the General Assembly in adopting Senate Joint Resolution No. 30. Senate Joint Resolution No. 67 was concurred in by the House of Representatives on May 29, 1970 (Senate Journal May 29, 1970, p. 149). It reads as follows:

Senate Joint Resolution No. 67

RESOLVED, BY THE SENATE OF THE SEVENTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that, in adopting Senate Joint Resolution No. 30, which submits to the electors of this State a constitutional amendment prohibiting the taxation of personal property by valuation as to individuals, it was the intention of this General Assembly to abolish the ad valorem taxation of personal property owned by a natural person or by two or more natural persons, and that, by the use of the phrase "as to individuals", this General Assembly intended to mean a natural person, or two or more natural persons as joint tenants or tenants in common.

The first of the three consolidated actions that are before us was filed by Lake Shore Auto Parts Co., a corporation, on December 9, 1970. The complaint named as defendants the county clerk of Cook County, the county assessor, the county collector and the members of the board of appeals of that county, as well as the director of the Department of Local Government Affairs of the State. It alleged that it was filed as a class action on behalf of the plaintiff (hereafter Lake Shore) and on behalf of all other corporations and other "non-individuals" subject to personal property tax. It asserted that the new Article IX-A violates the fourteenth amendment to the Constitution of the United States because its effect "is to

exonerate from ad valorem personal property taxation, on and after January 1, 1971, all personal property owned by 'individuals', while authorizing and requiring the continued ad valorem taxation of all personal property owned by entities other than 'individuals.' " It also alleged that the provisions of Article IX-A immediately became a part of and amended the Revenue Act of 1939, so that that statute "imposes ad valorem taxes only with respect to personal property owned by corporations and other entities which are not 'individuals' within the meaning of said Article IX-A." The complaint prayed for a decree "finding and declaring that the provisions of the Revenue Act of 1939 * * *, as amended by Article IX-A of the Constitution of Illinois, are unconstitutional, invalid and unenforceable insofar and to the extent that such statute purports to impose ad valorem taxes with respect to personal property owned by plaintiff and all corporations and other 'non-individuals' who are members of the class which plaintiff represents." An injunction, as well as relief appropriate to a class action, was also sought.

The answers of the defendants denied the legal conclusions asserted by the plaintiff. They did not admit the allegations that related to the representative character of the action, but they did not dispute any allegations of fact that related to the basic issues.

All parties moved for summary judgment, and the trial court entered an order on March 30, 1971, granting the basic relief prayed for in the complaint, but reserving jurisdiction to determine the class aspect of the action. The order also found that Article IX-A is not applicable to personal property taxes, the assessment of which was commenced prior to January 1, 1971. The defendant, Robert J. Lehnhausen, Director of the Department of Local

Government Affairs of the State of Illinois, has appealed, and the plaintiff has cross appealed from that portion of the order that related to the particular taxes to which the court's order was applicable.

A petition seeking leave to file an original action in this court was filed on May 10, 1971 on behalf of Eugene L. Maynard, "a natural person, citizen and taxpayer of the State of Illinois," and also on behalf of one high school district and three grade school districts. Leave to file was granted on May 12, 1971. The defendants are those state and county officers who are defendants in the Lake Shore case. The complaint, which sought a declaratory judgment and other relief, alleges the adoption of Article IX-A. It is suggested that "the *Lake Shore* case will come to the Court in a flawed condition in that it will not properly present the parties and arguments essential for a full determination of the important revenue question. . . . Without the presence of Eugene L. Maynard, neither the presence nor the position of a natural person will be adequately presented to this Court." The complaint alleged that it was filed by Maynard, who is alleged to own non-business personal property, on behalf of himself and all others similarly situated. It also alleged that it was filed on behalf of the named public bodies for themselves and all other public bodies which receive proceeds from personal property taxation.

The deficiencies in parties and in legal arguments in the *Lake Shore* case is said to lie in the fact that the only plaintiff in that case is a corporation, and in the fact that the complaint in that case does not contain a direct request for a declaration of the unconstitutionality of Article IX-A. "The pleadings of that case place into question only certain sections of the Illinois Revenue Act. The

attack is made upon these sections as affected by the passage of Article IX-A rather than upon the constitutionality of the Article itself. . . . If the Court considers the *Lake Shore* case without additional parties and arguments, it may be foreclosed from ruling on the central issue of constitutionality of the Amendment."

No new facts were alleged in the Maynard case, and the defendant Lehnhausen has conceded the factual questions and filed a brief to stand as its answer in this case. The brief on behalf of the defendant county officers appears similarly to have been intended to stand as a motion to dismiss the complaint.

Another action was instituted by a complaint for declaratory judgment which was filed in the circuit court of Cook County on May 8, 1971, on behalf of several plaintiffs. Clemens K. Shapiro alleged that he is a natural person who owns personal property in his own name and real property jointly with his wife, none of which property is owned or used for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family. Jerome Herman alleged that he is a natural person and operates and conducts a business as a sole proprietor. Guy S. Ross and Eugene D. Ross allege that they are natural persons and operate, as a partnership, a business which owns property. M. Weil and Sons, Inc., a corporation, alleges that it is the owner of property situated in Cook County.

The complaint alleges that each of the plaintiffs is acting in a representative capacity on behalf of all others similarly situated. The defendants are those state and county officers who were named in the *Lake Shore* complaint. The complaint alleges the adoption of Article IX-A and asserts various interpretations of that Article, some of which are

advanced by all of the plaintiffs and others by one or another of the plaintiffs. To this complaint the defendant Lehnhausen, Director of the Department of Local Government Affairs, filed a motion to dismiss on May 9, 1971. He also filed a "Petition for Instructions" which recited that the Lake Shore and Maynard cases were pending in the Supreme Court of Illinois, asserted that the issues in all of the three cases were substantially the same, and that it "would appear to be a duplication of effort for this Court to consider the issues involved in the case at bar [the Shapiro case] while at the same time the Illinois Supreme Court has essentially the same issues before it for consideration." The petition for instructions suggested that the Shapiro case be held in abeyance for the determination of the cases already pending before the Supreme Court. No order was entered with respect to this petition. On May 19, 1971, a motion to strike was filed in behalf of the defendant county officers. On May 28, 1971, an order was entered, by a judge other than the judge who heard the Lake Shore case, finding that the action was properly maintained as a class action and that each plaintiff had standing to bring the action in its own behalf and was a proper representative of the class he purported to represent. The order found that Article IX-A "is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families." Except as to the plaintiff Clemens K. Shapiro and members of his class, the complaint was dismissed. All of the plaintiffs in the Shapiro case have appealed from this judgment.

The plaintiffs in the Maynard and Shapiro cases justify the institution of their actions upon the ground that there are deficiencies as to parties and as to legal propositions in the Lake Shore case which might, without the assistance which they volunteer to supply, preclude the possibility of full consideration of the issues by this court. That it is not necessary that each person or group of persons favorably or unfavorably affected by a legislative classification be made parties to an action challenging the validity of that classification is apparent. Major cases involving discrimination of the sort here alleged have not required the presence, as parties, either in person or by representative, of all those affected. See, *e.g.*, *Lawrence v. State Tax Com. of Miss.* (1932), 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102.

There are no factual issues in the present cases, and the order of this court which consolidated the Lake Shore and Maynard cases provided: "Counsel may brief and argue all issues as to the validity and effect of the constitutional amendment known as Article IX-A of the Constitution of 1870." (See *Hux v. Raben* (1967), 38 Ill. 2d 223.) Additional class actions were not necessary to place before the court all pertinent legal theories. We shall, however, consider the arguments advanced by counsel in those cases.

Neither the plaintiffs in the Maynard case nor those in the Shapiro case are content with the interpretation of Article IX-A arrived at by Judge Walter P. Dahl in the Lake Shore case. That interpretation was that the new Article "purports to prohibit the taxation of personal property by valuation as to 'individuals', and only as to 'individuals,' while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois . . . which imposed such personal property taxes as to

property owned by corporations and other 'non-individuals.'"

One alternative construction, advanced by the plaintiffs in the Shapiro case, is that the "Illinois' Constitution of 1870, as amended by the addition of Article IX-A, specifically prohibits, and declares to be unconstitutional the imposition in Illinois of the property taxes imposed by Article IX, Section 1, on all forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner." This construction is achieved by disregarding the fact that Article IX-A is clearly concerned only with the taxation of personal property, and by concentrating upon the fact that the last sentence in the official explanation which appeared upon the ballot at the election on November 3, 1970, when Article IX-A was approved, mentioned taxes upon both real and personal property. That explanation was as follows:

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

The last sentence of the explanation, however, is not a part of the amendment, and its reference to real property taxes was made in describing the existing provisions of Article IX, Section 1, which are modified by Article IX-A.

Based upon the circumstance that the phrase "as to individuals" is printed in italics in Article IX-A, the May-

nard plaintiffs turn to materials other than the legislative explanations in a search for a technical meaning. They say: "The unusual circumstance that the words 'as to individuals' are italicized in the constitutional amendment, an unprecedented practice in constitutional drafting, strongly suggests that the General Assembly, in drafting Senate Joint Resolution No. 30 used the word 'individuals' as one having established technical significance and usage in the classification of taxpayers upon whom personal property taxes have been imposed."

They purport to find the technical meaning that they seek in the circumstance that two different forms, administratively prescribed, have been used for personal property tax returns. One form is to be used by "individuals, partnerships, and unincorporated associations owning or controlling personal property used in agriculture, and all individuals owning or controlling any personal property which is not owned or used in connection with any business (other than agriculture) * * *." The other form is to be used by "[p]roprietorships, partnerships and unincorporated associates engaged in business (other than agriculture) * * *." On the assumption that the word "individuals" was intended to have an established technical meaning because it was printed in italics, the Maynard plaintiffs, and the Shapiro plaintiffs as well, argue that the word "individuals" was used to denote a class of natural persons owning personal property not used in business.

There is, however, a more prosaic explanation for the fact that the words "as to individuals" are printed in italics. When Senate Joint Resolution No. 30 was originally introduced on April 29, 1969, the proposed Article IX-A read as follows: "Notwithstanding any other provision of

this Constitution, the taxation of personal property by valuation is prohibited." (Senate Journal, April 29, 1969, p. 1038.) On May 15, 1969, Senate Joint Resolution No. 30 was amended "by striking the period and adding the following: 'as to individuals.'" Senate Journal, May 15, 1969, pp. 1407-8.

The added words were placed in italics in accordance with routine legislative practice, which contemplates that in the case of amendments, new material is to be italicized. The rules of the Senate of the 76th General Assembly provided: "All resolutions originated in the Senate proposing amendments to the Constitution shall be ordered printed and shall be printed in the same manner in which bills are printed." (Senate Journal, Feb. 18, 1969, p. 163.) And as to bills, they provided: "Senate Bills and House Bills in the Senate shall be printed with new matter in italics and omitted or superseded matter enclosed in brackets and underlined." Senate Journal, Feb. 18, 1969, p. 161.

There is thus no underpinning for the argument that the General Assembly intended that the word "individuals" should be given an artificial meaning. The official explanations, which are not discussed in the Maynard brief, definitely negative such an intention. We have examined the other materials to which the Maynard and Shapiro plaintiffs have referred, but have found nothing which persuades us that the words of Article IX-A should be given anything other than their natural meaning.

We conclude that the meaning of Article IX-A is that ad valorem taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited.

The Maynard case plaintiffs and all of the Shapiro case plaintiffs, with the exception of Shapiro, contend that Ar-

ticle IX-A, so construed, violates the equal protection clause of the fourteenth amendment to the constitution of the United States. Lake Shore contends that it is the Revenue Act, which must be regarded as amended by Article IX-A, rather than the Article itself, which violates the equal protection clause. We shall first consider the basic question of the validity of the discrimination effected by Article IX-A.

The new Article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed. Of course, the equal protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the states in drawing the lines between classes. Nevertheless, a state may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated.

The Supreme Court of the United States has thus described the governing principles:

"Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237;

Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293; * * * *State Board of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co. v. Conway*, supra, 281 U.S., at 159.

"But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of legislation.' *Royster Guano Co. v. Virginia*, 253 U.S. 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 37; *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160 * * *."

Allied Stores of Ohio, Inc. v. Bowers, (1959), 358 U.S. 522, 526-27, 79 S. Ct. 437, 3 L. Ed. 2d 480, 484-85.

When classifications are reasonable, it is because of differences in the nature of the property or in the use to which it is put. The nature of the tax is important, too, for what may be a reasonable classification for a license, or for a privilege tax, is not necessarily a reasonable classification for a property tax.

Mr. Justice Brandeis stated the criterion this way in his dissenting opinion in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406, 48 S. Ct. 553, 72 L. Ed. 927, 932: "In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civ-

ilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible."

Article IX-A must be read against the scheme of property taxation established pursuant to Article IX of the Constitution of 1870, which, with respect to property taxes contemplates the levy of "a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." (Constitution of 1870, Article IX, Sec. 1.) Taxes levied by municipal corporations are required to be "uniform in respect to persons and property, within the jurisdiction of the body imposing the same." (Constitution of 1870, Article IX, Sec. 9.) The permissible exemptions from taxation are thus described. "The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. * * *" Constitution of 1870, Article IX, Sec. 3.

Against this background the incongruity of the prohibition contained in Article IX-A is apparent. It cannot rationally be said that the prohibition promotes any policy

other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others. For the purpose of a tax by valuation upon the ownership of real or personal property, the identity of the owner is a neutral consideration, as is his status as sole proprietor, joint tenant, tenant in common, partner (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 25), limited partnership (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 61), member of a professional service corporation (Ill. Rev. Stat. 1969, ch. 32, par. 415-1 *et seq.*), or of a professional association (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 101 *et seq.*; see Sup. Ct. Rule 721; 43 Ill. 2d, Rule 721).

We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the fourteenth amendment. Apart from that discrimination, the validity of the Revenue Act is not challenged, and we hold that it is Article IX-A which must fall. The validity of Article IX of the Constitution and of the Revenue Act are therefore not affected.

The judgment of the circuit court of Cook County in No. 44199 (Lake Shore) is reversed, and the cause is remanded to that court with directions to dismiss the complaint. Insofar as the judgment of the circuit court in No. 44432 (Shapiro) dismissed the complaint as to all of the plaintiffs other than Clemens K. Shapiro, it is affirmed; insofar as that judgment sustained the complaint as to Clemens K. Shapiro, it is reversed and the cause is remanded to that court with directions to dismiss the complaint. In No. 44308 (Maynard), the complaint is dismissed.

No. 44199. *Reversed and remanded with directions.*

No. 44432. *Affirmed in part; reversed in part, and remanded with directions.*

No. 44308. *Complaint dismissed.*

(Lake Shore Auto Parts Co. v. Korzen, Nos. 44199, 44308, 44432)

MR. JUSTICE DAVIS, dissenting:

The majority opinion holds that our State Constitution of 1870, as modified by Article IX-A, may not validly classify exemptions from ad valorem personal property taxation on the basis of the ownership of the property, and that such exemption may be made only upon a classification based upon the nature of the property or its use. I dissent from this pronouncement.

It is clear that the United States Constitution imposes no particular modes of taxation upon the states and leaves them unrestricted in their power to tax those domiciled within their borders so long as the tax imposed is upon property within the state, or on privileges enjoyed there, and so long as the tax is not so palpably arbitrary or unreasonable as to infringe upon the equal protection and due process requirements of the fourteenth amendment. *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 284, 52 S. Ct. 556, 559, 76 L. Ed. 1102, 1105.

The majority opinion recognizes that "the equal protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the states in drawing the line between classes"; and that, "nevertheless, a state may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated." This general rule is found in the quotation from *Allied Stores of Ohio v. Bor-*

ers, 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480, cited by the majority. The rule has been expressed and exemplified many times in varying terms. Examples are: "Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action." (*Welch v. Henry*, 305 U.S. 134, 144, 59 S. Ct. 121, 124, 83 L. Ed. 87, 92); "It is a salutary principle of judicial decision, . . . that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." (*Metropolitan Casualty Inc. Co. v. Brownell*, 294 U.S. 580, 584, 55 S. Ct. 538, 540, 79 L. ed. 1071, 1073.) Due process imposes no rigid rule of equality in taxation, and irregularities resulting from singling out one particular class for taxation or exemption infringe no constitutional requirement. (*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S. Ct. 868, 872, 81 L. ed. 1245, 1253). It is only the invidious discrimination or classification which is patently arbitrary and utterly lacking in rational justification which is barred by the due process or equal protection clauses. *Flemming v. Nestor*, 363 U.S. 603, 611, 612, 80 S. Ct. 1367, —4 L. ed. 2d 1435, 1445.

The variety of ways of expressing the rule that a legislative classification for taxation purposes is not violative of the fourteenth amendment if it has a reasonable relation to the subject of the particular legislation so that all

persons similarly situated are treated alike, and pertinent citations, are found in 16A C.J.S. Constitutional Law, Sections 520, 521, 649.

In this litigation, as is often the case, the particular expression of the rule which the majority of the court chooses to rely upon may be dictated by the outcome which the judges of the majority think to be proper. Beyond doubt, the fourteenth amendment does not impose on the states an inflexible and technical rule of equal taxation, and the extent to which the states may go in devising a legislative classification for taxation is illustrated by the statement of the Supreme Court in *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 284, 285, 52 S. Ct. 556, 559, 76 L. ed. 1102, 1108:

"The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions."

The Supreme Court in *Lawrence* also stated that there is no constitutional requirement that a system of taxation should be uniform as applied to individuals and corporations, regardless of the circumstances in which it operates (286 U.S. 276, 283, 52 S. Ct. 556, 558, 76 L. ed. 1107), and we have just recently held that for the purpose of income taxation, corporations may be placed in one class and individuals in another and each taxed differently. (*Thorpe v. Mahin*, 43 Ill. 2d 36.) The language of the court at pages 45 and 46 is worthy of repetition:

"It is next contended that the Act violates the uniformity provision of Section 1 of Article IX of our constitution and the equal protection and due process

requirements of the fourteenth amendment to the United States constitution by creating multiple classes and discriminating unreasonably among them. This contention is advanced specifically against the provisions which tax corporations at a 4% rate and individuals, trusts, and estates at 2½% rate.

"Both the equal protection argument and the uniformity argument depend on the reasonableness of putting corporations in one class and individuals, trusts, and estates in another class for purposes of this tax. (See *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289). When the due process contention has been advanced, this court, citing Supreme Court cases, has stated: 'It has long been settled that the power of the legislature to make classifications, particularly in the field of taxation, is very broad, and that the fourteenth amendment imposes no "iron rule" of equal taxation. (Citations.) The reasons justifying the classification, moreover, need not appear on the face of the statute, and the classification must be upheld if any state of facts reasonably can be conceived that would sustain it. (Citations.) The burden therefore rests on one who assails the statute to negate the existence of such facts. (Citations.)' *Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 489-490.

"When the uniformity contention has been advanced this court has stated: 'It is well established that the legislature has broad powers to establish reasonable classifications in defining subjects of taxation. * * * Such classification must, however, be based on real and substantial differences between persons taxed and those not taxed. (Citations.)' (*Klein v. Hulman*, 34 Ill. 2d 343, 346-347.) 'In order to prevail on an allegation that a statute or portion of a statute is unconstitutional, the plaintiff has the burden of showing how the legislature has violated the constitution.' *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289, 291.

"In short, petitioners have the burden of showing that the challenged classification is unreasonable. Their

only assertion is that 'corporations are at a disadvantage when they compete in the same type of business with individual proprietorships or partnerships because of the rate differential.' This assertion has been rejected by the Supreme Court as to a Federal tax (*Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed. 389), and as to a State tax (*Fort Smith Lumber Co. v. Arkansas ex rel. Arbuckle*, 251 U.S. 532, 40 S. Ct. 304, 64 L. Ed. 396), and by this court (*People v. Franklin National Insurance Co. of New York*, 343 Ill. 336; *Michigan Millers Mutual Fire Insurance Co. v. McDonough*, 358 Ill. 575), where, for purposes of the tax in question, corporations were placed in one class and individuals in another and each were taxed differently."

The majority, however, holds that as to a property tax the classification for exemption or taxation may not be based upon the character of the ownership, but only upon the nature of the property itself. Thus, the majority is of the opinion that the classification may not be based upon the corporation — individual distinctions which we upheld in *Thorpe*.

In *Thorpe* this court reversed its prior holding that income is property (*Bachrach v. Nelson*, 349 Ill. 579), and held that an income tax was not a property tax. The significance of this determination was that Section 1 of Article IX of our Constitution of 1870 required the levying of a tax "by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." At the same time, the constitutional provisions permitted a tax upon franchises and privileges in such manner as the legislature might direct, so long as it was uniform as to each "class." Obviously, the legislature could not, under the foregoing provisions, impose

an income tax upon corporations at one rate and upon individuals at a lesser rate if it were a tax on property. Our constitution then prohibited any tax on property unless structured to be uniform as to valuation.

After reaching the conclusion that an income tax was not a property tax, the court faced no barrier in upholding the Illinois Income Tax Act. In the case at bar, after Article IX-A amendment to the Constitution of 1870 was adopted, the uniformity provisions of Section 1 of Article IX were no longer effective as to the taxation of personal property of individuals, and the court should have found no impediment to upholding the validity of Article IX-A and the abolishment of this tax as to individuals.

Constitutional provisions requiring property to be taxed uniformly in proportion to its value are not uncommon to the states. In the California Railroad Tax cases (*San Mateo County v. Southern Pacific R. Co.*, 13 Fed. 722, appeal dismissed per stipulation, 116 U.S. 138; *Santa Clara County v. Southern Pacific R. Co.*, 18 Fed. 385, aff'd other grounds, 118 U.S. 394), which held that unequal taxation, based upon the character of the owner, was forbidden by the fourteenth amendment, a constitutional provision requiring uniformity of taxation was involved. Even though the California constitution specified that all property be taxed in proportion to its value, a state statute especially provided that as to railroad properties only, the amount of a mortgage on the real estate was not to be deducted in ascertaining the value of the real estate for taxation purposes. The trial court quite properly held that this method of valuation, as to railroads only, was improper under the circumstances, and the United States Supreme Court affirmed the lower court on a non-constitutional basis without reaching the constitutional question. The California

Railroad Tax cases should be read, with cognizance, that the state constitution required all property to be taxed in proportion to its value, and that the cases arose at a time when it was necessary to establish that the word, "persons" as used in the fourteenth amendment, included corporations. Apparently, the latter point had a strong bearing on the expressions found in these cases.

In the case at bar, by virtue of the adoption of Article IX-A, there is no constitutional requirement that taxes on personal property be uniform as to individuals and corporations so that each pays a tax in proportion to the value of his or its property. Article IX-A, which we are called upon to consider, eliminated this requirement; it provides that "the taxation of personal property is prohibited as to individuals." Thus, the case at bar is a far cry from one in which the legislature is attempting to discriminate between individuals and corporations in the face of a constitutional provision prohibiting such discrimination. Here the question for determination is whether, absent the requirement of a state constitution that corporate and individual personal properties be taxed the same, the equal protection clause of the fourteenth amendment permits them to be taxed differently? I believe that it does!

Without the constitutional requirement of uniformity on the taxation of properties, there is no reason or justification in the case at bar for stating that personal property taxation may not be classified on the basis of the ownership of the property. The Constitution of 1870, as amended by Article IX-A, does not so provide, and the Constitution of 1970 suggests the contrary. Article IX of the Constitution of 1970 relates to revenue, and Section 5 thereof pertains to personal property taxation. Subsection (a) thereof provides that the legislature "may clas-

sify personal property for purpose of taxation by valuation, abolish such taxes on any or all *classes* and authorize the levy of taxes in lieu of the taxation of personal property by valuation." (Emphasis ours.) Without more, it could be said that the word "classes" refers only to classes of property, but subsection (c) refers to the abolition of all ad valorem personal property taxes by January 1, 1979, and the replacement of the lost revenue, and provides: "Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those *classes* relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971." (Emphasis ours.) Obviously, the word "classes" as there used, does not refer to classes of property; it refers to classes of property owners, and provides for taxation according to the character of the owner. If the majority opinion is to stand and Article IX-A held to be unconstitutional, then under consistent application of its rationale, subsection (a) of Section 5 of the new constitution is likewise unconstitutional.

The majority opinion chose to rely upon the rationale of *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. ed. 927. I believe that the elucidation and logic of the dissent of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, offers the better reason. Therein, Mr. Justice Brandeis made some observations which are particularly apropos here. The court had under consideration a tax on the gross receipts of corporate taxicab companies where no similar tax was imposed upon the receipts of individuals who operated taxicabs. The majority held that the classification was based solely upon the character of the owner, and that it violated the fourteenth amendment.

people and the legislature of the State. The General Assembly, which drafted and adopted Senate Joint Resolution No. 30, had previously at the same legislative session already exempted from such taxation, household furniture and one automobile, per household, used for personal pleasure. (Ill. Rev. Stat. 1969, ch. 120, par. 500.21a.) The Article IX-A amendment was overwhelmingly ratified by the people of the State. The Constitution of 1970, likewise adopted by the vote of the people, expressed their concern over the form and use of personal property taxation. The newly adopted constitution prohibits the reinstatement of any ad valorem personal property tax abolished before July 1, 1971, the effective date of the new constitution. This provision refers to the personal property tax as to individuals which was abolished by Article IX-A, and the majority opinion runs counter to this constitutional prohibition in that it reinstates the personal property tax as to individuals. In addition, the new constitution provides that all ad valorem personal property taxes shall be abolished on or before January 1, 1979.

The obvious spirit of the Article IX-A amendment, the will of the people, as expressed by its adoption, and the intent and purpose of the legislature, should not be thwarted unless a construction to this effect is required. Thus, it is very appropriate that we consider the mischief sought to be remedied and the purpose to be accomplished by the Article IX-A amendment. (*Wolfson v. Avery*, 6 Ill. 2d 78, 88). Likewise, the court should memorialize the salutary rule of law that an amendment to a state constitution should be deemed violative of the Federal Constitution only where the asserted constitutional rights cannot otherwise be protected and effectuated. *Reynolds v. Sims*, 377 U.S. 533, 584, 84 S. Ct. 1362, —, 12 L. ed. 2d 506, 540.

After considering the background of this constitutional amendment and the purpose which it, along with the other contemporary legislative enactments and constitutional adoptions seeks to accomplish, I believe that the classification found in the Article IX-A amendment does not constitute an invidious discrimination; that it seeks to accomplish and promote a valid policy expressive of the will of the people and the intent and purpose of the legislature; and that the distinction upon which the classification for exemption is based does not overstep the limitations imposed by the fourteenth amendment.

APPENDIX B

**STATE OF ILLINOIS SS
COUNTY OF COOK**

**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS**

COUNTY DEPARTMENT, CHANCERY DIVISION

LAKE SHORE AUTO PARTS CO.,
an Illinois corporation, on its own
behalf and also as representative of a
class of corporations and other "non-
individuals", which class is herein de-
scribed,

Plaintiffs,

vs.

**BERNARD J. KORZEN, County
Treasurer and ex-officio County Col-
lector of Cook County, GEORGE E,
KEANE and HARRY H. SEMROW,
Members of the Board of Appeals of
Cook County, P. J. CULLERTON,
County Assessor of Cook County,
EDWARD J. BARRETT, County
Clerk of Cook County, and ROBERT
J. LEHNHAUSEN, Director, Depart-
ment of Local Government Affairs of
the State of Illinois,**

Defendants.

No. 70 CH 5123

ORDER

This cause coming on to be heard upon the Motion for Summary Judgment of LAKE SHORE AUTO PARTS CO., an Illinois corporation, plaintiff, by and through its attorneys, ORLIKOFF, PRINS, FLAMM & SUSMAN, and upon the Cross-motion For Summary Judgment of defendant ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois, by and through the Attorney General of Illinois, and the Cross-motion For Summary Judgment of defendants KORZEN, KEANE, SEMROW, CULLERTON and BARRETT, assessing and taxing officials of Cook County, by and through the State's Attorney of Cook County,

The Court having examined the pleadings and memoranda filed by the parties hereto, having heard the arguments of counsel and being fully advised in the premises

DOES HEREBY FIND:

1. That there is no genuine issue as to any material fact in this cause, and it is therefore appropriate and proper that the cause be determined on the Motion and Cross-motions For Summary Judgment.

2. That the plaintiff, LAKE SHORE AUTO PARTS CO., is a corporation duly organized and existing under the laws of Illinois, and on April 1, 1970, was the owner of personal property having a taxable situs in the County of Cook, which property has been included on the assessment role now being prepared by the assessing officials of Cook County for the tax year 1970; that the plaintiff has standing to bring this action on its own behalf, and it is not at this time necessary or appropriate to determine whether the action is properly brought and maintained as a class action or to determine the definition of the plaintiff class.

3. That an amendment to the Illinois Constitution of 1870, designated as Article IX-A, was approved by the people of Illinois at a referendum held on November 7, 1970, and such amendment, by its terms, became effective January 1, 1971; that said Article IX-A purports to prohibit the taxation of personal property by valuation as to "individuals", and only as to "individuals", while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, §482 et seq.) which impose such personal property taxes as to property owned by corporations and other "non-individuals".

4. That said Article IX-A is self-executing, and the necessary effect of the adoption thereof is to amend the various provisions of the Revenue Act of Illinois, specifically including but not limited to § 18 thereof (Ill. Rev. Stat. 1969, ch. 120, § 499), so as to exempt from personal property taxes thereby imposed all personal property owned by "individuals", while retaining such taxes as to personal property owned by corporations and other "non-individuals."

5. That the Revenue Act of Illinois, as so amended by Article IX-A of the Illinois Constitution, deprives the plaintiff corporation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States: that said Revenue Act of Illinois, to the extent that it purports to impose personal property taxes with respect to the property owned by plaintiff, is therefore unconstitutional, void and of no effect whatsoever.

6. That Article IX-A of the Illinois Constitution is not applicable with respect to personal property taxes imposed by the Revenue Act of Illinois for the year 1970, the as-

assessment date for which was April 1, 1970, and the assessment of which had been commenced prior to January 1, 1971, the effective date of Article IX-A, notwithstanding that such assessment had not been completed as of that date.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

7. The plaintiff's Motion for Summary Judgment is granted in part and denied in part, the Court declaring that the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, §§ 482 et seq.), said Revenue Act having been amended by Article IX-A of the Illinois Constitution, is violative of the Fourteenth Amendment to the Constitution of the United States and is held to be void and unenforceable insofar as said Revenue Act purports to impose personal property taxes on plaintiff.

8. The defendants' Cross-motions For Summary Judgment are granted in part and are denied in part, the Court declaring that Article IX-A of the Illinois Constitution is not applicable to, and does not impair the collection of, personal property taxes imposed by the Revenue Act of Illinois, the assessment of which were commenced prior to January 1, 1971.

9. Except for those matters adjudicated by paragraphs 7 and 8 of this Order, this Court retains jurisdiction of this cause for all purposes.

10. Pursuant to Rule 304(a) of the Rules of the Supreme Court of Illinois, the Court expressly finds that there is no just reason for delaying enforcement or appeal of this Order. In the event of an appeal from this Order, the Court is of the opinion that the interests of justice would be best served by hearing and deciding the appeal as expeditiously as possible because of the manifest pub-

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**lic importance of the issues and the substantial amount of
tax revenues that are involved.**

DATED: March 30, 1971.

ENTER:

**JUDGE WALTER P. DAHL,
Judge, Circuit Court of
Cook County, Illinois**

APPENDIX C

STATE OF ILLINOIS
COUNTY OF COOK SS

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, TAX DIVISION

CLEMENS K. SHAPIRO, JEROME
HERMAN, d/b/a THE SPOT, GUY
S. ROSS AND EUGENE R. ROSS,
d/b/a GUY S. ROSS & CO., a part-
nership; and M. WEIL AND SONS,
INC., an Illinois Corporation, all in-
dividually and in representative ca-
pacity,

Plaintiffs,

vs.

EDWARD J. BARRETT, County
Clerk of Cook County; BERNARD
J. KORZEN, County Treasurer and
ex-officio County Collector of Cook
County; GEORGE E. KEANE and
HARRY H. SEMROW, Members of
the Board of Appeals of Cook County;
P. J. CULLERTON, County Assessor
of Cook County, and ROBERT J.
LEHNHAUSEN, Director, Depart-
ment of Local Government Affairs of
the State of Illinois,

Defendants.

No. 71 L 5745

ORDER

This cause appears before this Court on plaintiffs' Complaint for Declaratory Judgment, filed pursuant to Chapter 110, Section 57.1 of the Civil Practice Act. The action was filed by plaintiffs for themselves and in a representative capacity on behalf of all other persons similarly situated. The cause comes on for hearing on separate motions, to strike and dismiss that complaint, filed by County and State defendants. Defendants have elected to stand on their motions.

No genuine issue as to any material fact emerges.

The plaintiffs are:

1. Clemens K. Shapiro, is a natural person, citizen and taxpayer of the State of Illinois, resident of and a salaried employee in the County of Cook wherein he owns personal property in his own name, and owns real property jointly with his wife, none of which property is owned or used in the operation of, or for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family.
2. Jerome Herman, is a natural person, and a citizen of the State of Illinois, and as sole proprietor owns, operates and conducts a business located in Cook County, Illinois, and is the owner of property and a taxpayer herein.
3. Guy S. Ross and Eugene D. Ross, natural persons, citizens and residents of the State of Illinois, both of whom are partners, and as partners operate and conduct a business as a partnership duly organized under the laws of the State of Illinois, which busi-

ness entity is located in the County of Cook and is the owner of property and a taxpayer therein.

4. M. Weil and Sons, Inc., a corporation duly organized and existing under the laws of the State of Illinois, is located in, and is the owner of property situated in the County of Cook and a taxpayer therein.

Each of the plaintiffs is an owner of property subject to the ad valorem tax directed to be imposed by Article IX of the Illinois Constitution of 1870, and imposed by the Illinois Revenue Act of 1939, which property has been assessed by valuation and continues to be so assessed by defendants pursuant to that constitutional and statutory authority.

The electorate of this State, on November 3, 1970, adopted amending Article IX-A to the Illinois Constitution of 1870. This amendment became part of the Illinois Constitution on November 25, 1970, and reads as follows:

“Article IX-A

TAXATION OF PROPERTY

§ 1. Taxation of personal property prohibited

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*”

“SCHEDULE

“Paragraph 1. This amendment shall become effective January 1, 1971.”

Plaintiffs contend as follows:

All plaintiffs contend that Illinois Constitution of 1870, as amended by the addition of Article IX-A, specifically prohibits, and declares to be unconstitutional the imposition, in Illinois, of the property taxes imposed by Ar-

ticle IX, Section 1, on *all* forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner.

All plaintiffs contend that if Article IX-A does not prohibit the taxation of all property, then Article IX-A prohibits the tax to be measured by the value of the property taxed.

All plaintiffs contend that the prohibition of Article IX-A, which abolishes the imposition of property tax measured by valuation of the property taxes, extends to those taxes so measured where the assessment of plaintiffs' property has been commenced by defendants prior to, even though not completed on January 1, 1971, the effective date of Article IX-A, and payment due thereafter.

Natural Persons contend that:

The designation "individuals" in Article IX-A properly and validly describes, is intended to apply, and does apply solely to them; and the taxation by valuation prohibited in Article IX-A, if not applicable to all property owned by them, is applicable to personal property owned by them and used by them for their personal purposes; and that,

Article IX-A prohibits taxation, by valuation of personal property as to them alone, while denying that prohibition as to all others, is proper, valid, and constitutional under both Illinois Constitution and the Constitution of the United States.

Both business entities and corporations contend that:

Article IX-A, effective January 1, 1971, as an amendment to Illinois Constitution of 1870 is offensive to the Constitution of the United States.

If the designation "individuals" in Article IX-A invokes prohibition of taxes by valuation on personal property exclusively as to "natural persons" and personal property owned by them, but denies the same prohibition to business entities and corporations, then such classification is discriminatory, unreasonable and offensive both to Illinois Constitution and the Constitution of the United States. This is true for the reasons that such classification is invalidly predicated upon purported differences between *users* of identical property and the *use* to which that property is put, instead of differences found to exist between the forms of the property upon which that tax is directly laid. The employment of such base constitutes special legislation prohibited by Article IV, Section 22 of Illinois Constitution, as well as denying to business entities and corporations due process of law and the equal protection of the law guaranteed to them by Article II, Section 2 of the Illinois Constitution, and the Fourteenth Amendment to the Constitution of the United States.

Unless the exclusion of property owned by "individuals" is construed to exclude the property of business entities and corporations, as well as that of natural persons, then the employment in Article IX-A of the term "individuals" is so vague, uncertain, and incapable of definitive application to the context of Article IX, that Article IX-A must fall because it is totally absent the comprehension required, especially of constitutional provisions, by both Illinois Constitution and the Constitution of the United States.

Business entities contend that:

(a) The designation "individuals" in Article IX-A is correctly and properly described, and is intended to apply to, and does include business entities which own property because the natural person owners of that business en-

tity are personally and individually liable for the payment of that tax.

Article IX-A prohibiting taxation by valuation of property owned by such business entities, while denying that prohibition as to corporations is proper, valid and constitutional under both Illinois' Constitution and the Constitution of the United States.

Corporations contend that:

If the designation "individuals" in Article IX-A applies to any or all owners of property except corporate owners of property, then such classification is discriminatory, unreasonable, and offensive to both the Illinois Constitution and the Constitution of the United States.

Defendants contend that the taxation by valuation of real property and other property, as provided in Article IX shall continue and remain, in all regards, unaffected by Article IX-A; however:

Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited only as to natural persons; but as to them, only as to the personal property owned by them; but as to that personal property owned by them, only such of that property which is used by them for the personal enjoyment of themselves and their families.

This matter appearing on the pleadings aforesaid, presenting the issues to this Court as delineated by those pleadings, and the Court having heard arguments by all parties in support of their respective positions, **THIS COURT FINDS:**

1. That a genuine cause and controversy exists, and that this action is properly maintained under the provisions of

Chapter 110, Section 57.1 (Declaratory Judgments), Civil Practice Act, Illinois Revised Statutes, 1969.

2. Each of these plaintiffs has standing to bring this action in his or its own behalf and is a proper representative of his class.

3. That this action is properly maintained as a class action, and the members of those classes are adequately and competently represented by counsel herein.

4. That Article IX-A of the Illinois Constitution of 1870 is valid, constitutional and immune to all of the plaintiffs' assaults, both under the Illinois Constitution and the Constitution of the United States.

5. That Article IX-A is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families.

6. That these findings by this Court make it unnecessary to consider contentions made by plaintiffs in the alternative.

7. That all issues as found heretofore are found in favor of the defendants, except as to those issues relating to the plaintiff Clemens K. Shapiro and members of his class involving personal property owned and used by them for the personal enjoyment of themselves and their families.

8. That motions to strike and dismiss plaintiffs' Complaint are sustained in regards and in respect of those found in favor of the defendants, except as to those issues raised by plaintiff Clemens K. Shapiro and members of his class involving personal property owned and used by

them for the personal enjoyment of themselves and their families.

9. Pursuant to Rule 304(a) of the Rules of the Supreme Court of Illinois, the Court expressly finds that there is no just reason for delaying enforcement or appeal of this Order. In the event of an appeal from this Order, the Court is of the opinion that the interests of justice would be best served by hearing and deciding the appeal as expeditiously as possible because of the manifest public importance of the issues and the substantial amount of tax revenues that are involved.

WHEREFORE, IT IS ORDERED, ADJUDGED and DECREED that defendants' motions to strike and dismiss are sustained as to all plaintiffs, except the plaintiff Clemens K. Shapiro and members of his class, and plaintiffs' Complaint is stricken as to all issues and in all regards and respects contrary to and in variance with the judgment of this Court; that Amending Article IX-A of the Illinois Constitution is valid and constitutional in all respects and is immune to attack under any provision or provisions of the Illinois Constitution of 1870 and the United States Constitution, and that said Amending Article IX-A declares its prohibition exclusively as to any personal property tax on the personal property owned by individuals and used for their personal enjoyment and that of their families.

ENTER:

THOMAS C. DONOVAN,
Presiding Judge, Tax Division,
Circuit Court of Cook County,
Illinois.

Date: May 27, 1971

APPENDIX D

January 22, 1971

FILE NO. S-260
TAXATION:
Personal Property
Tax Exemption

Honorable Robert J. Lehnhausen
Director, Department of Local
Government Affairs
325 West Adams Street
Springfield, Illinois 62704

Dear Sir:

I have your recent letter wherein you state:

"The Department of Local Government Affairs is vested with certain statutory powers and duties relating to the assessment of property for property tax purposes, among which are the following:

"1. 'Assist and advise the local governments of the State in matters pertaining to — the assessment and equalization of property—'

"2. 'Direct and supervise — the assessment for taxation of all real and personal property in this State—'

"3. 'Confer with, advise and assist local assessment officers relative to the assessment of property for taxation'. (Chapter 127, Paragraph 63b14.13 and Chapter 120, Paragraph 611, I.R.S.)

"Pursuant to such statutory provisions, inquiries have been made by local assessment officers concerning the effect of the amendment to the Illinois Constitution, approved by referendum on November 3, 1970, prohibiting, as to individuals, the taxation of personal property by valuation.

"We would appreciate receiving your opinion as to the following:

"1. Is an individual proprietor to be exempt from taxation on his business inventory and other personal property used in such business?

"2. Is the individual farmer exempt from taxation on farm equipment and personal property owned in his capacity as an individual farmer?

"3. Is the personal property of partnerships exempt, or will such personal property be taxable under the Revenue Act of 1939 because a partnership is considered to be an entity (even though composed of individuals) which requires treatment different from that accorded natural persons under the new Constitutional amendment?

"4. Is the personal property of a decedent's estate exempt from personal property tax if the heirs or legatees are individuals?

"5. Is the personal property of a decedent's estate exempt from personal property tax if the legatee is a corporation?

"6. Is the personal property held by an individual trustee exempt from taxation if the beneficiaries or beneficial owners are individuals? Is the answer different if the property is held by a corporate trustee?

"7. Is the personal property owned by tenants in common or joint tenants exempt from taxation?

"8. Is the personal property owned by a joint venture or other co-ownership exempt from taxation?

"Although the next assessment of personal property will be April 1, 1971, local assessing officials must soon begin to order the printing of forms for such assessment, and Supervisors of Assessment must be prepared to advise township assessors as required by Section 2 of the 'Revenue Act of 1939', (Chapter 120, Paragraph 483, I.R.S.). We would, therefore, appre-

ciate receiving your opinion at your earliest convenience."

As you have indicated in your letter, the amendment to the Illinois Constitution, approved by referendum on November 3, 1970, prohibits the taxation of personal property by valuation as to individuals. Your attention is called to Paragraph 499 of Chapter 120, 1969 Illinois Revised Statutes which states as follows:

"The property named in this section shall be assessed and taxed except so much thereof as may be, in this act, exempted:

"First: All real and personal property in this state.

"Second: All moneys, credits, bonds or stocks and other investments, the shares of stock of incorporated companies and associations, and all other personal property, including property in transit to or from this state, used, held, owned or controlled by persons residing in this state, and all intangible personal property of foreign corporations, except those excluded by section 18 of this Act, doing business in this state which is located in this state and used in their business transacted within the state, provided that the provisions of this section relating to the taxation of intangible personal property shall not apply to those foreign corporations which are required by law to pay a premium tax for the privilege of doing business in this state.

"Third: The shares of capital stock of banks and banking companies doing business in this state.

"Fourth: The capital stock of companies and associations incorporated under the laws of this state."

It can be observed from the language of the foregoing Paragraph 499 that the personal property tax is a tax upon

the personal property itself. Paragraph 534 of Chapter 120 does, of course, set forth certain rules pertaining to the listing of personal property but these do not change the nature of the personal property tax which is a tax upon the personal property.

It therefore becomes necessary for us to determine the effect of the constitutional amendment which prohibits the taxation of personal property by valuation as to individuals. It would be unreasonable to believe that the language of the constitutional amendment could expressly include each and every conceivable situation. Necessary implications and intendments from the language used in a statute may be resorted to in order to ascertain the legislative intent. See *U.S. v. Jones*, 204 Fed. 2d 745 (certiorari denied 346 U.S. 854). In that case the court said at page 754:

“Necessary implication refers to a logical necessity; it means that no other interpretation is permitted by the words of the Act construed; and so has been defined as an implication which results from so strong a probability of intention that an intention contrary to that imputed cannot be supported. 42 C.J.S., page 405 and cases there cited. The term is used where the intention with regard to the subject matter may not be manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances and the general language. *Burford v. Huesby*, 35 Cal. App. 2d 643, 96 P. 2d 380; *Goldstein v. Continental Ins. Co.*, 125 Neb. 112, 249 N.W. 78; 42 C.J.S., page 406. Consequently that which is implied in a statute is as much a part of it as that which is expressed, for a statutory grant of a power carries with it, by implication, everything necessary to carry out the power and make it effectual and complete.

• • • ”

Furthermore, at page 100 of Volume 34 of Illinois Law and Practice is found the following statement:

"In construing a statute to give effect to the legislative intent and purpose, the court should, if possible, give it a reasonable, sensible, practice, and common-sense construction even though such construction qualifies the universality of its language."

As indicated above, the personal property tax is a tax upon the personal property itself. The only logical conclusion then as to the meaning of the constitutional amendment (Article IX-A) is that if the effect of the tax would be directly upon an individual (as distinguished, for example, from a corporation) then such personal property tax is abolished.

Article IX-A of the Illinois Constitution of 1870 became effective January 1, 1971 and is as follows:

"Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

Provision for the adoption of Article IX-A was made by Senate Joint Resolution No. 30 of the 76th General Assembly which reads as follows:

"RESOLVED, BY THE SENATE OF THE SEVENTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that there shall be submitted to the electors of the State for adoption or rejection at the next election of members of the General Assembly of the State of Illinois, in the manner provided by law, a proposition to add Article IX-A to the Constitution, the added Article to read as follows:

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971."

Also pertinent is Senate Joint Resolution No. 67 which provides:

"RESOLVED, BY THE SENATE OF THE SEVENTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that, in adopting Senate Joint Resolution No. 30, which submits to the electors of this State a constitutional amendment prohibiting the taxation of personal property by valuation as to individuals, it was the intention of this General Assembly to abolish the ad valorem taxation of personal property owned by a natural person or by two or more natural persons, and that, by the use of the phrase 'as to individuals', this General Assembly intended to mean a natural person, or two or more natural persons as joint tenants or tenants in common."

Turning now to the questions which you have asked I shall discuss them in order. Your first question asks whether an individual proprietor is exempt from taxation on his business inventory and other personal property used in such business. Since the effect of such a tax would be upon an individual, I am of the opinion that the individual proprietor would be exempt. Similarly, the individual farmer is exempt in your second question.

Thirdly, you have inquired as to whether personal property of a partnership is exempt. A partnership is an asso-

ciation of two or more persons to carry on a business for profit. The effect of the taxation of partnership property would be directly upon the individual partners and consequently I am of the opinion that such property is also exempt.

In your fourth and fifth questions you inquired about the taxability of personal property in a decedent's estate. The effect of taxation of personal property in an estate would be directly upon the heirs of legatees. Consequently, if the heirs or legatees are individuals such personal property is exempt, but if the legatee is a corporation then such personal property would be subject to tax.

In your sixth question you inquired whether personal property held by an individual trustee is exempt from taxation if the beneficiaries or beneficial owners are individuals. Since the effect of the tax would be directly upon an individual beneficiary, such personal property would be exempt. The fact that the trustee is a corporation or an individual would make no difference.

Seventh, you inquired whether personal property owned by tenants in common or joint tenants as individuals is exempt. For the reasons stated above, such personal property would also be exempt. Personal property owned by individuals in a joint venture or other co-ownership would also be exempt since the effect of the tax would be upon individuals.

Very truly yours,
ATTORNEY GENERAL

APPENDIX E

**Testimony of Maurice W. Scott, Executive Vice President,
Taxpayers' Federation of Illinois, to Members of House
Revenue Committee.**

September 8, 1971

**Chairman Randolph and Members of the House Revenue
Committee:**

Without repeating what is now history, we all know that the Illinois Supreme Court by its recent decision in the Lake Shore Auto Parts Co. v. Korzen case, Nos. 44199, 44308 and 44432, held that the Illinois Constitution, as modified by Article IX-A which was approved last fall by the people by a ratio of more than 7 to 1, may not validly classify exemptions from ad valorem personal property taxation on the basis of the ownership of the property, and that such exemption may be made only upon a classification based upon the nature of the property or its use. In other words, the amendment which supposedly abolished the personal property tax on an ad valorem basis on individuals, and which was submitted by the General Assembly to the voters on November 3, 1970 with much success, no longer prevails. In dollar figures what does this decision mean? It means that the ad valorem personal property tax as it was on November 2, 1970, is still with us and breaks down approximately as follows relative to amounts actually collected:

(a) *Cook County—*

Personal property tax on corporations	\$126,000,000
Personal property tax on unincorporated business	13,000,000
Personal property tax on individuals	2,000,000

\$141,000,000

(b) *Downstate Counties—*

Personal property tax on corporations	\$111,000,000
Personal property tax on unincorporated rated business	20,000,000
Personal property tax on individuals	27,000,000

\$158,000,000

In 1969 the General Assembly passed a bill (S.B. 816) which exempted from personal property taxation household furniture used for the personal living purposes of the owner at his residence and one automobile used for personal pleasure purposes per household. This statute, Chapter 120, par. 500.21a, Illinois Revised Statutes, was not before the Court in the Lake Shore Auto Parts Co. case and is still valid. Under its provisions, taxpayers are relieved from paying about \$6,000,000 in ad valorem personal property taxes in Cook County and approximately \$53,000,000 in downstate counties.

It is a known fact that the people in Illinois are resentful of the Lake Shore decision, and they can't understand how the Court can over-turn their overwhelming decision last fall in approving the amendment to abolish the personal property tax on individuals. As a result of their resentment, we are meeting here today. Let us examine some of the complications and remedies as I see them.

In the new State Constitution, Section 5(a) of Article IX provides that the Legislature "may classify personal

property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation." Without more, it could be argued that the word "classes" refers only to classes of property, but Section 5(c) of Article IX of the new Constitution refers to the abolition of ad valorem personal property taxes by January 1, 1979, and the replacement of the lost revenue, and provides: "Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971." It is the opinion of many, and one that I lean to, that the word "classes" as used in said Section 5(c) does not refer to classes of property, but refers to classes of property owners and provides for taxation according to the character of the owner. If the decision of the Lake Shore Auto Parts Co. case is to stand and Article IX-A held to be unconstitutional, then under consistent reasoning, it could be argued with weight that Section 5(a) of Article IX of the new Constitution is also unconstitutional. In fact, I am doubtful of the constitutionality of the statute which exempts household furniture and one personal automobile per household if it is tested in the Courts. But a statute is presumed valid until it is proven otherwise, so we won't go into that phase of crystal gazing today, as we already have enough problems before us.

Now, I get to the nub of my presentation. It is my opinion that if the General Assembly, this fall or next year, does anything in the area of abolishing the personal property tax on an ad valorem basis, the safest thing to do would be to abolish it on all taxpayers — both on individ-

nals and on business, and make up lost revenues from both types of taxpayers. In this regard, the General Assembly would be faced with making up about \$300,000,000 in revenue.

I offer the following for consideration by members of the General Assembly in studying the problem of replacing revenues.

- (1) The new State Constitution, Article IX, Section 5(c), provides that when the General Assembly abolishes the personal property tax on an ad valorem basis, it shall replace all revenue lost by units of local governments as a result of the abolition of personal property taxes subsequent to January 2, 1971, by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying personal property because of the abolition of such taxes subsequent to January 2, 1971. Does this mean that a taxpayer who does not pay any personal property tax as of today because his household furniture and personal automobile are exempt, is not subject to any statewide replacement taxes that the General Assembly might enact?

Although not entirely free from doubt, my opinion is that he would be subject to statewide replacement taxes, because the "household furniture, personal automobile exemption" did not free him entirely from the ad valorem personal property tax. He is still subject to a personal property tax levied on the assessment of such items as animals, campers, clothes on his back, money in his pocket or in the bank, jewelry, etc.

- (2) My telephone has been deluged, and I know yours has too, since the decision in the Lake Shore Auto Parts Co. case last July, and the tenor of the public is: "Abolish the _____ personal property tax now, immediately, and replace the lost revenues from the State Income Tax." This idea and action thereon to carry it out by the Legislature would be most popular with the public, but in the name of sense, how can it be done at this late hour when the Governor had to veto and reduce recent appropriations to balance the budget for fiscal 1972? Do you as Legislators have the fortitude to cut or abolish present programs and to reduce spending sufficiently to come up with \$300,000,000 for local governments? It is possible but not probable, and such action, if you could do it, would be "the shot heard around the world."

In all fairness, may I state that through your action in 1969, counties and municipalities share in State Income Tax receipts to the extent of 1/12 and on a per capita basis. To insure property tax relief, maybe the Legislature should require a certain percent of such revenues be used by counties and municipalities for property tax relief and not use all of such receipts as additional spending revenues. A few counties and municipalities have carried out this idea on their own initiative in 1971 and reduced corporate fund levies.

Also, it should be noted that the common schools share heavily in the State Income Tax receipts through the School Formula, and this is a result of your previous action. In fact, in school year 1968-69, State aid claims paid to the common schools amounted to \$369.7 million, while in school year

1969-70 such State aid claims amounted to \$601.2 million, a percentage increase of approximately 63% in a period of one year.

- (3) The State Income Tax for fiscal 1972 (July 1, 1971 to July 1, 1972) is estimated to yield a total of 1.081 billion, or \$864 million from individuals and \$217 million from corporations.

Projecting this figure, I estimate that an additional State Income Tax rate of 1% on both individuals and corporations would yield about \$430 million in a 12 month period, or \$360 million from individuals and \$70 million from corporations. This takes into consideration the fact that the additional 1% rate would be free of deductions, credits, exemptions, etc.

In fact, on this basis an additional rate of $\frac{3}{4}$ of 1% would produce approximately \$322 million in a 12 month period, enough to replace revenues equivalent to the personal property tax receipts that would be collected for the year 1971.

- (4) The State R.O.T. and Use Tax revenue estimates for fiscal 1972 are \$1.085 billion (State rate is 4%). An additional rate of 1% would yield approximately \$272 million in a 12 month period.
- (5) Realizing the problem presented in (1) above, it is my opinion that the General Assembly should consider the replacement revenue possible for local governments which could be raised from a State wheel tax. In 1969 there were 4,349,697 passenger automobiles registered in the State of Illinois and 915,980 trucks, busses and trailers. A State wheel

tax of \$10 on each such vehicle, for example, collected by the State when such vehicles are registered annually with the State, and the receipts therefrom returned to local governments, would yield at least \$52 million a year. Airplanes and boats are also registered with an agency of government in the State of Illinois, and a State wheel tax on such "vehicles" would produce additional revenue.

- (6) The State R.O.T. rate of 4% extended to repair and alteration of real property or to real estate contracts would bring in more than \$20 million a year (see Illinois Legislative Council, File 7-535, January 1970).
- (7) The public utility tax on sales of gas, electricity and telephone and telegraph messages at the current rate of 5% is estimated to yield around \$160 million for fiscal 1972. An additional 1% to this rate would yield some \$32 million a year.
- (8) The State insurance premium tax for fiscal 1972 at a rate of 2% on gross premiums on all foreign insurance companies doing business in Illinois is estimated to yield \$53 million for fiscal 1972. An additional 1% to the rate on such premiums would yield approximately \$26.5 million.
- (9) The corporate franchise tax is estimated to yield for fiscal 1972 around \$25 million (the present rate is one tenth of 1% of stated capital and paid-in surplus, with a minimum of \$25 and a maximum of \$1 million).
- (10) The State cigarette tax at a rate of 12 cents per package is estimated to yield \$147 million for fiscal

1972. A rate of 1% is estimated to yield \$12-1/4 million in a 12 month period.

- (11) The liquor taxes for fiscal 1972 are estimated to yield around \$72 million. The rate on distilled spirits is \$2 per gallon, wine at 23 cents to 60 cents per gallon, and beer at 7 cents per gallon.
- (12) For your convenience, may I list the revenues expected for fiscal 1972 from what may be classified as fees and miscellaneous taxes as follows:

Racing taxes to General Fund	\$ 27,000,000	
Interest on State investments	44,000,000	
Real Estate Transfer Tax		
(State's share)	2,000,000	
Hotel Tax	9,500,000	
R. O. T. collection fee (local governments)	4,000,000	
Illinois Central R.R. Franchise	4,250,000	
Private Car Lines	2,250,000	
S. O. T. Trust Fund	16,000,000	(one shot proposition)
Auto Title Registration Fees	6,000,000	
Supt. of Public Instruction (reimbursement from Dept. of Public Aid)	4,750,000	
Dept. of Registration & Education	3,500,000	
Rentals from School Building Commission	2,750,000	
Miscellaneous Fees and Dept. Earnings (Fees of Departments, liquor licenses, Public Assistance Recovery fees, financial examination fees, etc.)	4,000,000	
	<hr/>	
	\$130,000,000	

APPENDIX F

August 19, 1971

Robert J. Lehnhausen
Director, Dept. of Local Government Affairs
State of Illinois
325 W. Adams Street
Springfield, IL 62704

Dear Sir:

Enclosed is a copy of the Resolution adopted by the Rock Island County Board of Supervisors at their regular monthly meeting on August 17, 1971. The same is being forwarded to your office for whatever action your department deems necessary.

It is the opinion of my office that this particular Resolution has no legal effect whatsoever upon the statutory obligations of the Supervisor of Assessments and/or the Board of Review and I will advise these officials accordingly.

Since it is apparent that this situation is somewhat unique, I would be extremely hesitant to make any statements as to the exact point in time at which your department will intervene in this situation and issue an order, pursuant to the appropriate provisions of the Revenue Act.

Since it is my opinion that the Supervisor of Assessments or the Board of Review could proceed to assess the personal property in Rock Island County which was obviously omitted by the township assessors, there is still a possibility that local officials will make an effort to assess personal property according to law. I do not feel, however, that I can make any statements on behalf of the Supervisor of Assessments of the Board of Review at this time.

If you desire any additional information in respect to this matter, do not hesitate to contact my office. My staff

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and I will make every effort to co-operate with your department in reaching a satisfactory solution to this problem.

Very truly yours,

s/ James N. DeWulf
James N. DeWulf
State's Attorney

RESOLUTION

WHEREAS, the taxpayers of the County of Rock Island have been assessed for the year 1971 for taxes to be extended and collected in 1972 pursuant to the law of the State of Illinois as the same existed from and between the dates of April 1, 1971 and first day of June 1971, and

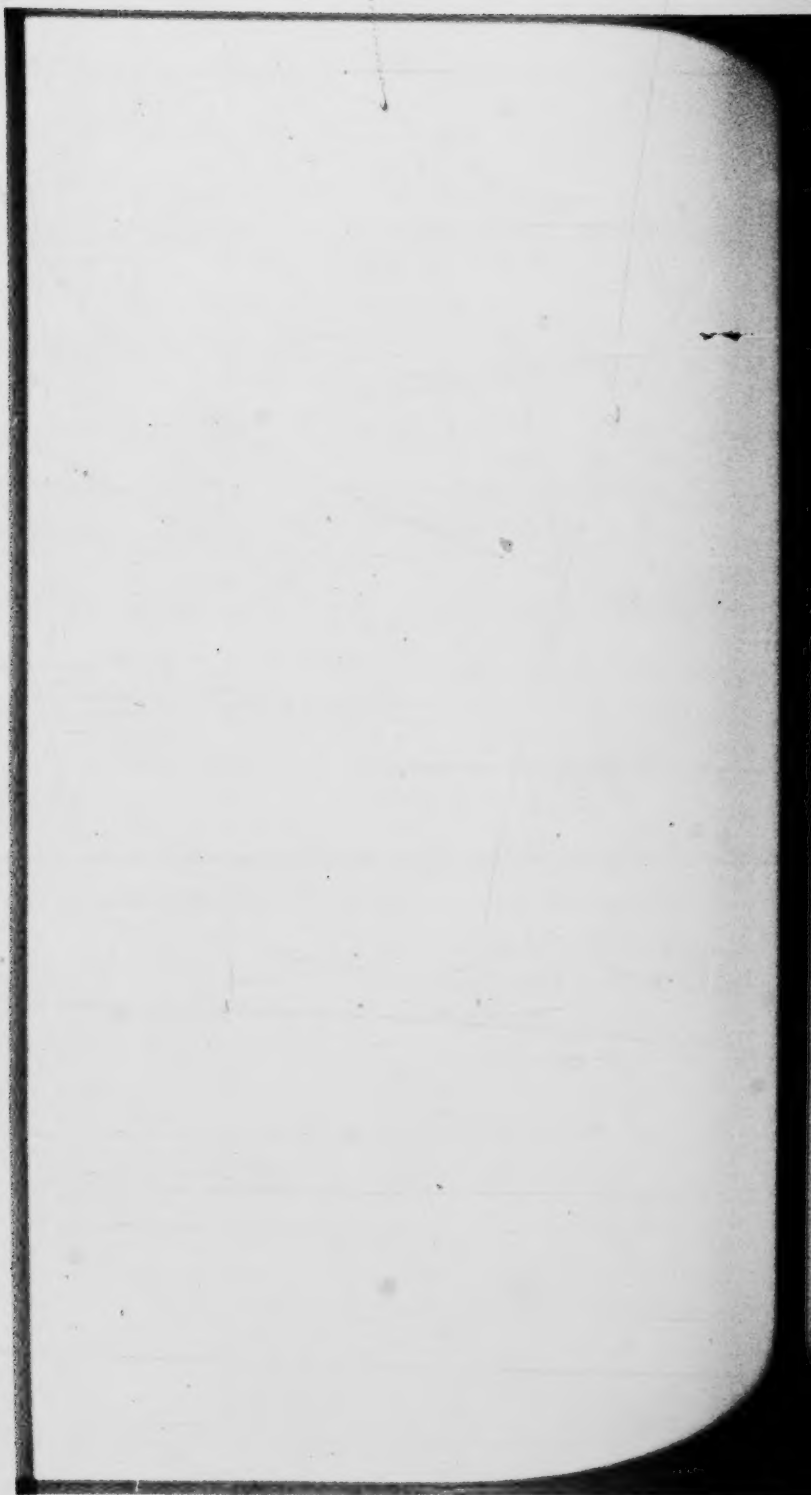
WHEREAS, the Supreme Court of Illinois has subsequent to the dates herein above mentioned pronounced that certain referendum mandate relating to personal property taxation duly voted by the electorate is now discriminatory, ineffective, and void, and

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF SUPERVISORS OF ROCK ISLAND COUNTY, ILLINOIS, on behalf of the taxpayers of the County of Rock Island that no funds be made available or committed to a retroactive assessment of personal property for the year 1971 and that as a statement of policy determines that no such further assessment shall be made in the County of Rock Island for the year 1971.

ADOPTED BY THE BOARD OF SUPERVISORS OF ROCK ISLAND COUNTY, ILLINOIS THIS 17th DAY OF AUGUST, 1971.

24—Yes.

10—No.



No. 71-625

FILED

JAN 20 1972

U. S. COURT HOUSE, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1971

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RICHARD B. OGILVIE, Governor
State Capitol
Springfield, Illinois
Pro Se

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IN THE
Supreme Court of the United States

OCTOBER TERM, A.D. 1971

No. 71-685

ROBERT J. LEHNHAUSEN,
Petitioner,
vs.

LAKE SHORE AUTO PARTS, et al.,
Respondents.

**AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS**

INTEREST OF AMICUS

With the consent of all parties involved in the proceedings before this Court in *Lehnhausen v. Lake Shore Auto Parts*, No. 71-685, Richard B. Ogilvie, Governor of the State of Illinois, files this Brief in support of the Petition for Certiorari.

As chief executive officer of the State, the Governor of Illinois not only has the responsibility faithfully to execute the laws but also to plan and implement a sound and fair taxation program that will ensure the financial integrity of the State. As a principal part of this program, the Governor advocated, and the people of the State of Illinois approved by constitutional referendum, the abolition of the personal property tax as it relates to individual persons.

The invalidation of the constitutional amendment by the Illinois Supreme Court, solely on Federal constitutional grounds, has undermined the Governor's taxation program

and has perpetuated in Illinois a tax that is almost universally conceded to be inequitable and impossible to administer fairly. Unless the judgment of the Illinois Supreme Court is reversed, state governments will be placed in a Federal constitutional strait jacket, unable to develop fair and effective taxation programs. Moreover, legislatures in other States may be seriously misguided in the development of their taxation programs if they proceed under the influence of the Illinois Court's erroneous view of Federal constitutional law.

The majority opinion of the Illinois Supreme Court, relying solely upon Federal constitutional grounds, placed substantial restrictions on the State's taxation powers which seriously impair the power of both the legislature and the people of the State by constitutional amendment to make rational classifications for taxation purposes. Only this Court can correct this erroneous interpretation of Federal constitutional law and remove the improper restrictions imposed by the Illinois Court, under color of Federal constitutional law, upon the State's taxation program.

QUESTION PRESENTED

Whether the Illinois Supreme Court Erred in Holding, Contrary to the Controlling Decisions of This Court, That Abolition of the Personal Property Tax Upon Individuals But Not Upon Corporations, by Means of a State Constitutional Amendment, Created an Unreasonable and Invidious Discrimination Between Individuals and Corporations in Violation of the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

On November 3, 1970, the people of the State of Illinois approved an amendment to the State's 1870 Constitution (Article IX-A) which stated in pertinent part that "[n]otwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals." (Emphasis in original.)

This suit was brought by a corporate taxpayer challenging the constitutionality of the constitutional amendment on the grounds, *inter alia*, that removing the personal property tax burden from individuals, but maintaining that burden upon corporate taxpayers,* constituted invidious discrimination against corporations in violation of the Equal Protection Clause of the Fourteenth Amendment. A majority of the Illinois Supreme Court sustained this contention, holding that, at least for the purpose of the imposition of an *ad valorem* personal property tax, no rational distinction could be drawn between individuals (i.e., natural persons) and corporations; hence, to relieve one class alone of the tax burden constituted a violation of the Equal Protection Clause.

* Under the new 1970 Illinois Constitution, the legislature must abolish all personal property taxes on or before January 1, 1979. The new Constitution provides that any personal property tax abolished before the effective date of the Constitution (July 1, 1971) may not be reinstated. 1970 Ill. Const., art. IX, § 5(b). This provision was added in contemplation that personal property taxes on individuals would be effectively terminated by Article IX-A of the 1870 Constitution.

REASONS FOR GRANTING THE WRIT

The Illinois Supreme Court Erred in Holding, Contrary to the Controlling Decisions of This Court, That Article IX-A of the 1870 Illinois Constitution, Which Abolished the Personal Property Tax as to Individuals But Not as to Corporations, Created an Unreasonable and Invidious Discrimination Between Individuals and Corporations in Violation of the Equal Protection Clause of the Fourteenth Amendment

The general principles applicable to the instant case are relatively clear, although their application in the present case produced a sharp division in the Illinois court. The prevailing judgment and decision, invalidating the state constitutional amendment, are not consistent with the often-expressed views of this Court.

The applicable principles regarding the validity of state taxation statutes under the Equal Protection Clause have been frequently reiterated by this Court. Thus, for example, in *Allied Stores of Ohio v. Flowers*, 358 U.S. 522 (1959), this Court stated the following:

“***The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in divising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to

close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Citations omitted.] 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co. v. Conway*, [281 U.S. 146, 159]." 358 U.S. at 526-527.

More generally, this Court has frequently noted that a classification is not arbitrary or violative of the Equal Protection Clause if *any* state of facts reasonably can be conceived that would sustain the classification. E.g., *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). Thus, the question presented in the instant case reduces to this—whether any rational distinction can be drawn between corporations and individuals so as to justify the imposition of a personal property tax (or, indeed, any other tax) upon the corporations but not upon the individuals.

This Court has long taken cognizance of the fact that the corporate structure yields advantages which justify the imposition of higher or different taxes upon corporations, as opposed to individuals. This Court has noted that

"[t]hese advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships." *Flint v. Stone Tracy Co.*, 220 U.S. 107, 162 (1911) (excise tax upon corporations measured by net income sustained).

Because of these advantages, this Court has therefore held, in numerous circumstances, that taxes may be imposed upon corporations, as opposed to individuals, or upon certain types of corporations, as opposed to other types of corporations and individuals. Thus, for example, in *White River Co. v. Arkansas*, 279 U.S. 692 (1929), this Court sustained a statute imposing back taxes upon corporations if their property had previously been undervalued over the constitutional objection that the reassessment provisions were not applicable to natural persons.

The *White River* case is the first of several cases* which undermined the authority of *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928) (Holmes, Brandeis, and Stone, JJ., dissenting), striking down a state corporate gross receipts tax on equal protection grounds. *Quaker City*, therefore, stands as a relic from an earlier period in which this Court, with some frequency, struck down state regulatory and taxation statutes on Fourteenth Amendment grounds. The majority of the Illinois Court apparently recognized this fact by relying upon, although misapplying, the *dissenting* opinion of Mr. Justice Brandeis in *Quaker City*. The Illinois Court erred in failing to recognize that Mr. Justice Brandeis in fact took the position that a rational basis did exist for distinguishing between corporate and individual taxpayers, citing *Flint v. Stone Tracy Co.*, *supra*:

"There, as here, the tax was imposed merely because the owner of the business was a corporation, as distinguished from an individual or a partnership. There, as here, the character of the owner was the sole fact on which the distinction was made to depend. There, as

* E.g., *Lawrence v. Tax Comm'n*, 286 U.S. 276 (1932); *Bekins Van Lines v. Riley*, 280 U.S. 80 (1929); *Commonwealth v. Life Assurance Co.*, 419 Pa. 370, 214 A.2d 209 (1965), appeal dismissed, 384 U.S. 268 (1966).

here, the discrimination was not based on any other difference in the source of the income or in the character of the property employed." 277 U.S. at 411.

See, in addition, *Fort Smith Lumber Co. v. Arkansas*, 251 U.S. 532 (1920) (Holmes, J.) (State may discriminate between corporations and individuals by making former liable to be taxed on shares held in other corporations, themselves fully taxed, while leaving individuals free from such liabilities); cf. *Atlantic Coast Line v. Daughton*, 262 U.S. 413, 423-424 (1923). See also *Crescent Oil Co. v. Mississippi*, 257 U.S. 129, 137 (1921).

In *Nashville, Chattanooga & St. L. Ry. v. Browning*, 310 U.S. 362 (1940), this Court sustained the assessment of an *ad valorem* property tax upon both tangible and intangible property which was assessed differently with respect to (and with greater liability upon) public service corporations than upon all other taxpayers. In addition, see, e.g., *Rapid Transit Corp. v. New York*, 303 U.S. 573, 578-579 (1938). See also *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Charleston Ass'n v. Alderson*, 324 U.S. 182, 190-191 (1945).

Not only have the States, consistently with the Equal Protection Clause, been permitted to distinguish, for taxation purposes, between individuals and corporations and between corporations of various types, but the States have been permitted, if their policy so dictated, to exempt entirely from taxation (including *ad valorem* property taxation) particular property based upon the nature of the owner of the property. Cf., e.g., *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 512 (1937); *Randolph v. Simpson*, 410 F.2d 1067, 1069 (5 Cir. 1969). The most recent case in this area is *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970), in which this Court sustained state property tax exemptions for institutions and facilities owned by religious and other charitable organizations.

As previously stated, there are substantial differences between corporations and individuals, and the "Constitution does not require things different in fact . . . to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). While all personal property taxes are to be eliminated in Illinois on or before the beginning of 1979, the people of Illinois, by constitutional amendment, chose to recognize "degrees of evil" (*Truax v. Raich*, 239 U.S. 33, 43 (1915)) and to eliminate the tax in the first instance upon individuals who do not enjoy the advantages which flow from ownership of property in a corporate form.

The majority of the Illinois Supreme Court were persuaded that, because the tax in question was a property tax, a valid classification under the Equal Protection Clause could not be based upon the character of the owner.* Not only did the Illinois Court cite no authority for the talismanic quality which it ascribed to the property tax, but, as previously indicated (pp. 5-7, *supra*), its view is not consistent with that adopted by this Court.

Moreover, as this Court has indicated, the practical oper-

* "The new article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property." 49 Ill.2d at 148, 273 N.E.2d at 598.

The Illinois Court further stated:

"When classifications are reasonable it is because of differences in the nature of the property or in the use to which it is put. The nature of the tax is important, too, for what may be a reasonable classification for a license, or for a privilege tax, is not necessarily a reasonable classification for a property tax." 49 Ill.2d at 149-150, 273 N.E.2d at 598.

ation of a statute, rather than the form of words used therein, constitutes the critical factor in determining the constitutionality of such a statute. E.g., *Lawrence v. Tax Comm'n*, 286 U.S. 276, 280 (1932) (statute taxing individuals, but not domestic corporations, on income derived from activities outside state held not unconstitutional). In substance, a property tax is not imposed upon inanimate property, but rather upon the persons who own that property, who exercise the right to hold and enjoy the fruits of that property. There is therefore no reason why, for the purposes of the Fourteenth Amendment, the type of ownership of property—be it corporate or individual—cannot provide a rational basis for classification. If corporations and individuals may be classified differently with respect to their right to receive or earn income,* for example, then there is no basis in reason why they cannot also be classified rationally with respect to the taxation of their right to own, control and enjoy the fruits of personal property.

In summary, therefore, the amicus contends (1) that there is a rational basis to distinguish between individuals and corporations in regard to the imposition of the personal property tax because of the basic differences between these two types of entities and the advantages which the corporate form of ownership affords; and (2) that there is no reasonable basis to distinguish between the property tax and other forms of taxation where distinctions between individuals and corporations have consistently been sustained by this Court over constitutional objections.

* Both the Illinois Supreme Court and this Court have held that individuals and corporations may be distinguished in the burden of the income tax which each type of entity must bear. E.g., *Lawrence v. Tax Comm'n*, *supra*; *Thorpe v. Mahin*, 43 Ill.2d 36, 250 N.E.2d 633 (1969).

CONCLUSION

For all of the foregoing reasons, the amicus respectfully urges that the Petition for a Writ of Certiorari in No. 71-685 be granted and that the judgment of the Supreme Court of Illinois be reversed.

Respectfully submitted,

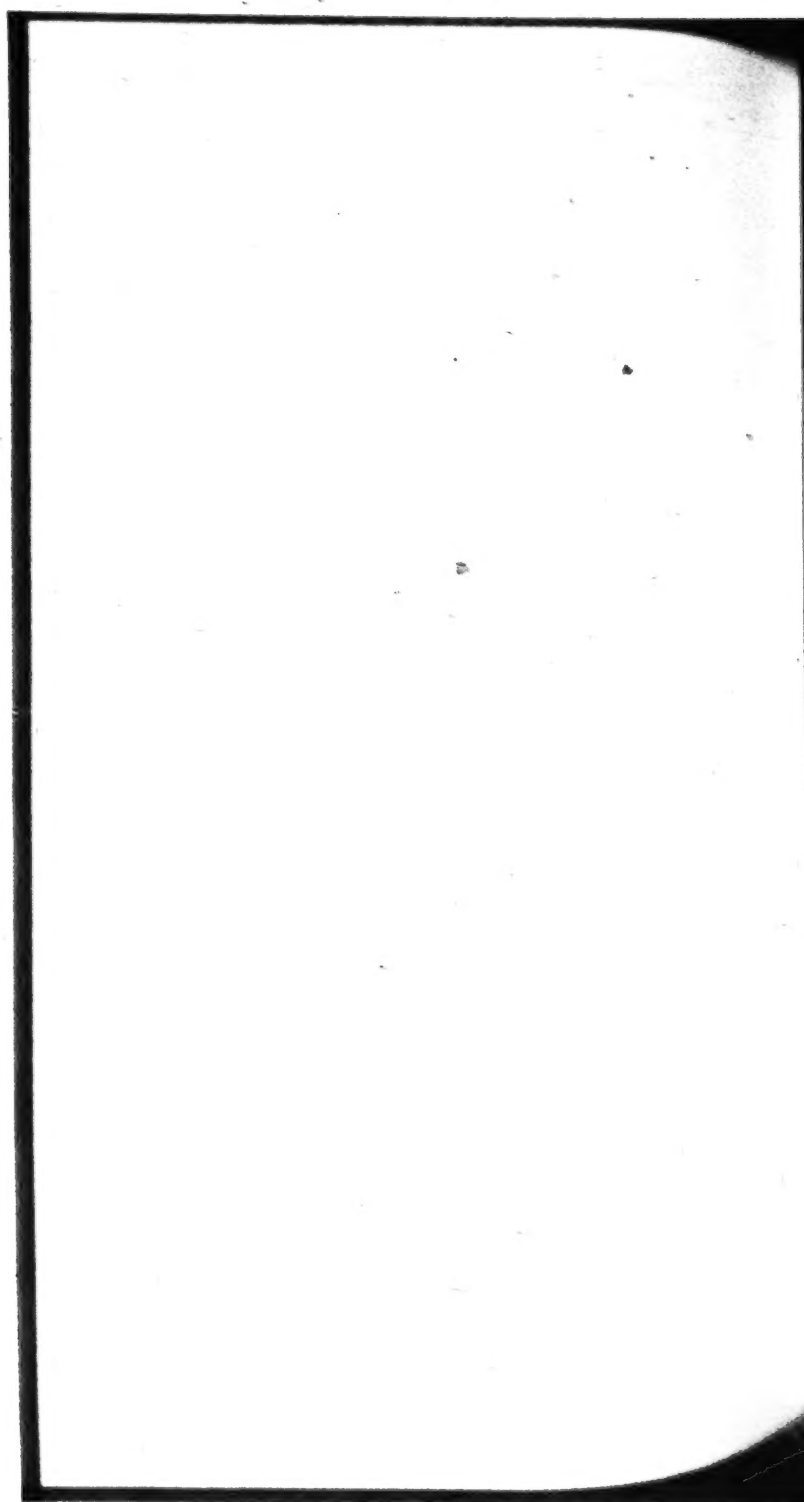
RICHARD B. OGILVIE

Governor of the State of Illinois

State Capitol

Springfield, Illinois

Pro Se



IN THE

Supreme Court of the United States

No. 71-674

LAKE SHORE AUTO PARTS CO., an Illinois Corporation, on its own behalf and also as representative of a class of corporations and other "non-individuals",

Appellant and Petitioner,

vs.

BERNARD J. KORZEN, County Treasurer and ex-officio County Collector of Cook County, GEORGE M. KEANE and HARRY H. SEMROW, Members of the Board of Appeals of Cook County, P. J. CULLERTON, County Assessor of Cook County, EDWARD J. BARRETT, County Clerk of Cook County, and ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois,

Appellees and Respondents.

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondent.

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County, Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

CONSOLIDATED RESPONSE TO JURISDICTIONAL STATEMENT FILED IN CASE NO 71-691, AND TO JURISDICTIONAL STATEMENT AND, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI FILED IN CASE NO 71-674, AND REPLY TO MOTION TO STRIKE ON THE BRIEF IN OPPOSITION TO CASES NOS. 71-674, 71-685 AND 71-691.

In each of the proceedings herein consolidated, the petitioners have requested that this Court issue a writ of certiorari to the Illinois Supreme Court to review its decision in the consolidated proceeding, which decision is attached hereto as Appendix "A". In that decision, the Illinois Supreme Court ruled that Article IX-A, being a recently adopted amendment to the Illinois Constitution of 1870 which purported to relieve individuals of *ad valorem* personal property taxes while leaving corporations subject to those taxes, was unconstitutional in that it violated the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. The effect of the Illinois court's decision was to reimpose personal property taxes on individuals as well as corporations. Each of the petitioners in the actions here consolidated would have this Court reverse the decision of the Illinois Supreme Court.

The Illinois Supreme Court had before it an appeal in the case entitled *Lake Shore Auto Parts Co., et al. v. Korzen, et al.*, wherein the Honorable Walter P. Dahl, of the Circuit Court of Cook County, had held that while Article IX-A was constitutional, it had the effect of making certain provisions of the Revenue Act of the State of Illinois unconstitutional and that neither corporations nor individuals were subject to *ad valorem* personal property taxes. That decision is attached hereto as Appendix "B".

In the case entitled *Clemens K. Shapiro, et al. v. Barrett, et al.*, the Honorable Thomas J. Donovan of the Circuit Court of Cook County had held that Article IX-A was constitutional and that its effect was to exempt from personal property taxes such property as was owned by individuals and used solely for their pleasure and convenience and that of their families. That decision is attached as Appendix "C".

The third action before the Illinois Supreme Court was an original action entitled *Eugene Maynard, et al. v. Barrett, et al.*, in which plaintiffs took the position that the amendment to the Illinois Constitution of 1870 known as Article IX-A was unconstitutional and that, therefore, the original Article IX was still in effect and there could be no discrimination between corporations and individuals in the imposition of *ad valorem* personal property taxes.

The majority decision of the Illinois Supreme Court (Appendix "A") agreed with the arguments of plaintiffs in the *Maynard* case. Mr. Justice Davis filed a dissent (Appendix "D") in which he found that Article IX-A was constitutional and that it was permissible to exempt individuals from *ad valorem* personal property taxation while retaining such taxes on corporations.

Pending before this Court in Case No. 71-685 is the petition filed on behalf of Robert J. Lehnhausen, Director of Local Governmental Affairs of the State of Illinois (one of the parties defendant in the *Lake Shore* case). In his petition, Director Lehnhausen requests this Court to reverse the decision of the Illinois Supreme Court and to direct the Illinois Supreme Court either to affirm the decision of Judge Donovan of the Circuit Court of Cook County or, to adopt as the majority decision the dissent of Justice Davis.

In the petition in Case No. 71-691 (*Barrett v. Shapiro*), the State's Attorney of Cook County on behalf of the various Cook County officials represented by him, also asks this Court to reverse the decision of the Illinois Supreme Court and to hold that Article IX-A, being an amendment to the Illinois Constitution of 1870, is valid and exempts individuals from *ad valorem* personal property taxes while retaining such taxes upon corporations.:

In the third proceeding before this Court, Case No. 71-674, entitled *Lake Shore Auto Parts v. Korzen*, the petitioner also requests that the decision of the Illinois Supreme Court be reversed, but presumably would request that the decision of Judge Dahl be affirmed.

The plaintiffs who filed the *Maynard* action have here filed a consolidated motion opposing the positions of the petitioners in each of the three actions consolidated here, and would ask this Court to either refuse to accept the petitions for writs of certiorari or to affirm the decision of the Illinois Supreme Court.

The Governor of the State of Illinois has, in Case No. 71-685, filed an *amicus curiae* brief supporting the petition for writ of certiorari filed by this petitioner.

This petitioner respectfully submits that the arguments set forth in the petitioner's petition for writ of certiorari and the argument set forth by Governor Ogilvie in his *amicus curiae* brief are correct and should be persuasive.

For the reasons set forth, both in this petitioner's petition and in the *amicus curiae* brief filed in support of that petition, petitioners respectfully request this Court to grant the petition and to issue a writ of certiorari to the Illinois Supreme Court and to reverse that decision with directions that either the opinion of the Honorable Thomas J. Donovan of the Circuit Court of Cook County be affirmed, or that the dissenting opinion of Mr. Justice Davis of the Illinois Supreme Court be adopted as the majority decision.

Respectfully submitted,

WILLIAM J. SCOTT,

*Attorney for Robert J. Lehnhausen,
Director of Local Government Affairs,
of the State of Illinois.*

FRANCIS T. CROWE,
CALVIN C. CAMPBELL,
Of Counsel.

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APPENDIX "A"

LAKE SHORE AUTO PARTS CO.,
an Illinois Corporation, et al.,

Appellees,

v.

BERNARD J. JORZEN, County
Treasurer and ex officio County Col-
lector of Cook County, et al.,

Appellants.

EUGENE L. MAYNARD, et al.,

Plaintiffs,

v.

EDWARD J. BARRETT, County
Clerk of Cook County, et al.,

Defendants.

CLEMENS K. SHAPIRO, et al.,

Appellants,

v.

EDWARD J. BARRETT, County
Clerk of Cook County, et al.,

Appellees.

Nos. 44199, 44308,
44432 Cons.

Mr. JUSTICE SCHAEFER delivered the opinion of
the court.

These consolidated cases present issues concerning the
construction and the validity of Article IX-A which was
added to the Constitution of 1870 by referendum vote at
the November 1970 election. On June 30, 1969, the Sen-
ate and the House of Representatives concurred in the

adoption of Senate Joint Resolution No. 30, which provided for the submission of the proposed amendment to a referendum vote. Senate Joint Resolution No. 30 (Senate Journal, June 30, 1969, p. 3476) is as follows:

SENATE JOINT RESOLUTION NO. 30

Resolved, By the Senate of the Seventy-sixth General Assembly of the State of Illinois, the House of Representatives concurring herein, that there shall be submitted to the electors of the State for adoption or rejection at the next election of members of the General Assembly of the State of Illinois, in the manner provided by law, a proposition to add Article IX-A to the Constitution, the added Article to read as follows:

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971.

The explanation of the amendment which appeared upon the referendum ballot is as follows:

“The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions in Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations.”

Subsequently, on May 19, 1970, the Senate adopted Senate Joint Resolution No. 67 (Senate Journal May 19, 1970,

p. 6) which contained a further statement of the intention of the General Assembly in adopting Senate Joint Resolution No. 30. Senate Joint Resolution No. 67 was concurred in by the House of Representatives on May 29, 1970 (Senate Journal May 29, 1970, p. 149). It reads as follows:

Senate Joint Resolution No. 67

RESOLVED, BY THE SENATE OF THE SEVENTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that, in adopting Senate Joint Resolution No. 30, which submits to the electors of this State a constitutional amendment prohibiting the taxation of personal property by valuation as to individuals, it was the intention of this General Assembly to abolish the ad valorem taxation of personal property owned by a natural person or by two or more natural persons, and that, by the use of the phrase "as to individuals", this General Assembly intended to mean a natural person, or two or more natural persons as joint tenants or tenants in common.

The first of the three consolidated actions that are before us was filed by Lake Shore Auto Parts Co., a corporation, on December 9, 1970. The complaint named as defendants the county clerk of Cook County, the county assessor, the county collector and the members of the board of appeals of that county, as well as the director of the Department of Local Government Affairs of the State. It alleged that it was filed as a class action on behalf of the plaintiff (hereafter Lake Shore) and on behalf of all other corporations and other "non-individuals" subject to personal property tax. It asserted that the new Article IX-A violates the fourteenth amendment to the Constitution of the United States because its effect "is to

exonerate from ad valorem personal property taxation, on and after January 1, 1971, all personal property owned by 'individuals', while authorizing and requiring the continued ad valorem taxation of all personal property owned by entities other than 'individuals.' " It also alleged that the provisions of Article IX-A immediately became a part of and amended the Revenue Act of 1939, so that that statute "imposes ad valorem taxes only with respect to personal property owned by corporations and other entities which are not 'individuals' within the meaning of said Article IX-A." The complaint prayed for a decree "finding and declaring that the provisions of the Revenue Act of 1939 * * *, as amended by Article IX-A of the Constitution of Illinois, are unconstitutional, invalid and unenforceable insofar and to the extent that such statute purports to impose ad valorem taxes with respect to personal property owned by plaintiff and all corporations and other 'non-individuals' who are members of the class which plaintiff represents." An injunction, as well as relief appropriate to a class action, was also sought.

The answers of the defendants denied the legal conclusions asserted by the plaintiff. They did not admit the allegations that related to the representative character of the action, but they did not dispute any allegations of fact that related to the basic issues.

All parties moved for summary judgment, and the trial court entered an order on March 30, 1971, granting the basic relief prayed for in the complaint, but reserving jurisdiction to determine the class aspect of the action. The order also found that Article IX-A is not applicable to personal property taxes, the assessment of which was commenced prior to January 1, 1971. The defendant, Robert J. Lehnhausen, Director of the Department of Local

Government Affairs of the State of Illinois, has appealed, and the plaintiff has cross appealed from that portion of the order that related to the particular taxes to which the court's order was applicable.

A petition seeking leave to file an original action in this court was filed on May 10, 1971 on behalf of Eugene L. Maynard, "a natural person, citizen and taxpayer of the State of Illinois," and also on behalf of one high school district and three grade school districts. Leave to file was granted on May 12, 1971. The defendants are those state and county officers who are defendants in the Lake Shore case. The complaint, which sought a declaratory judgment and other relief, alleges the adoption of Article IX-A. It is suggested that "the *Lake Shore* case will come to the Court in a flawed condition in that it will not properly present the parties and arguments essential for a full determination of the important revenue question. * * * Without the presence of Eugene L. Maynard, neither the presence nor the position of a natural person will be adequately presented to this Court." The complaint alleged that it was filed by Maynard, who is alleged to own non-business personal property, on behalf of himself and all others similarly situated. It also alleged that it was filed on behalf of the named public bodies for themselves and all other public bodies which receive proceeds from personal property taxation.

The deficiencies in parties and in legal arguments in the *Lake Shore* case is said to lie in the fact that the only plaintiff in that case is a corporation, and in the fact that the complaint in that case does not contain a direct request for a declaration of the unconstitutionality of Article IX-A. "The pleadings of that case place into question only certain sections of the Illinois Revenue Act. The

attack is made upon these sections as affected by the passage of Article IX-A rather than upon the constitutionality of the Article itself. * * * If the Court considers the *Lake Shore* case without additional parties and arguments, it may be foreclosed from ruling on the central issue of constitutionality of the Amendment."

No new facts were alleged in the Maynard case, and the defendant Lehnhausen has conceded the factual questions and filed a brief to stand as its answer in this case. The brief on behalf of the defendant county officers appears similarly to have been intended to stand as a motion to dismiss the complaint.

Another action was instituted by a complaint for declaratory judgment which was filed in the circuit court of Cook County on May 8, 1971, on behalf of several plaintiffs. Clemens K. Shapiro alleged that he is a natural person who owns personal property in his own name and real property jointly with his wife, none of which property is owned or used for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family. Jerome Herman alleged that he is a natural person and operates and conducts a business as a sole proprietor. Guy S. Ross and Eugene D. Ross allege that they are natural persons and operate, as a partnership, a business which owns property. M. Weil and Sons, Inc., a corporation, alleges that it is the owner of property situated in Cook County.

The complaint alleges that each of the plaintiffs is acting in a representative capacity on behalf of all others similarly situated. The defendants are those state and county officers who were named in the Lake Shore complaint. The complaint alleges the adoption of Article IX-A and asserts various interpretations of that Article, some of which are

advanced by all of the plaintiffs and others by one or another of the plaintiffs. To this complaint the defendant Lehnhausen, Director of the Department of Local Government Affairs, filed a motion to dismiss on May 9, 1971. He also filed a "Petition for Instructions" which recited that the Lake Shore and Maynard cases were pending in the Supreme Court of Illinois, asserted that the issues in all of the three cases were substantially the same, and that it "would appear to be a duplication of effort for this Court to consider the issues involved in the case at bar [the Shapiro case] while at the same time the Illinois Supreme Court has essentially the same issues before it for consideration." The petition for instructions suggested that the Shapiro case be held in abeyance for the determination of the cases already pending before the Supreme Court. No order was entered with respect to this petition. On May 19, 1971, a motion to strike was filed in behalf of the defendant county officers. On May 28, 1971, an order was entered, by a judge other than the judge who heard the Lake Shore case, finding that the action was properly maintained as a class action and that each plaintiff had standing to bring the action in its own behalf and was a proper representative of the class he purported to represent. The order found that Article IX-A "is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families." Except as to the plaintiff Clemens K. Shapiro and members of his class, the complaint was dismissed. All of the plaintiffs in the Shapiro case have appealed from this judgment.

The plaintiffs in the Maynard and Shapiro cases justify the institution of their actions upon the ground that there are deficiencies as to parties and as to legal propositions in the Lake Shore case which might, without the assistance which they volunteer to supply, preclude the possibility of full consideration of the issues by this court. That it is not necessary that each person or group of persons favorably or unfavorably affected by a legislative classification be made parties to an action challenging the validity of that classification is apparent. Major cases involving discrimination of the sort here alleged have not required the presence, as parties, either in person or by representative, of all those affected. See, *e.g.*, *Lawrence v. State Tax Com. of Miss.* (1932), 286 U.S. 276, 52 S. Ct. 556, 76 L. Ed. 1102.

There are no factual issues in the present cases, and the order of this court which consolidated the Lake Shore and Maynard cases provided: "Counsel may brief and argue all issues as to the validity and effect of the constitutional amendment known as Article IX-A of the Constitution of 1870." (See *Hux v. Raben* (1967), 38 Ill. 2d 223.) Additional class actions were not necessary to place before the court all pertinent legal theories. We shall, however, consider the arguments advanced by counsel in those cases.

Neither the plaintiffs in the Maynard case nor those in the Shapiro case are content with the interpretation of Article IX-A arrived at by Judge Walter P. Dahl in the Lake Shore case. That interpretation was that the new Article "purports to prohibit the taxation of personal property by valuation as to 'individuals', and only as to 'individuals,' while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois . . . which imposed such personal property taxes as to

property owned by corporations and other 'non-individuals.' "

One alternative construction, advanced by the plaintiffs in the Shapiro case, is that the "Illinois' Constitution of 1870, as amended by the addition of Article IX-A, specifically prohibits, and declares to be unconstitutional the imposition in Illinois of the property taxes imposed by Article IX, Section 1, on all forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner." This construction is achieved by disregarding the fact that Article IX-A is clearly concerned only with the taxation of personal property, and by concentrating upon the fact that the last sentence in the official explanation which appeared upon the ballot at the election on November 3, 1970, when Article IX-A was approved, mentioned taxes upon both real and personal property. That explanation was as follows:

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations."

The last sentence of the explanation, however, is not a part of the amendment, and its reference to real property taxes was made in describing the existing provisions of Article IX, Section 1, which are modified by Article IX-A.

Based upon the circumstance that the phrase "as to individuals" is printed in italics in Article IX-A, the May-

nard plaintiffs turn to materials other than the legislative explanations in a search for a technical meaning. They say: "The unusual circumstance that the words 'as to individuals' are italicized in the constitutional amendment, an unprecedented practice in constitutional drafting, strongly suggests that the General Assembly, in drafting Senate Joint Resolution No. 30 used the word 'individuals' as one having established technical significance and usage in the classification of taxpayers upon whom personal property taxes have been imposed."

They purport to find the technical meaning that they seek in the circumstance that two different forms, administratively prescribed, have been used for personal property tax returns. One form is to be used by "individuals, partnerships, and unincorporated associations owning or controlling personal property used in agriculture, and all individuals owning or controlling any personal property which is not owned or used in connection with any business (other than agriculture) * * *." The other form is to be used by "[p]roprietorships, partnerships and unincorporated associates engaged in business (other than agriculture) * * *." On the assumption that the word "individuals" was intended to have an established technical meaning because it was printed in italics, the Maynard plaintiffs, and the Shapiro plaintiffs as well, argue that the word "individuals" was used to denote a class of natural persons owning personal property not used in business.

There is, however, a more prosaic explanation for the fact that the words "as to individuals" are printed in italics. When Senate Joint Resolution No. 30 was originally introduced on April 29, 1969, the proposed Article IX-A read as follows: "Notwithstanding any other provision of

this Constitution, the taxation of personal property by valuation is prohibited." (Senate Journal, April 29, 1969, p. 1038.) On May 15, 1969, Senate Joint Resolution No. 30 was amended "by striking the period and adding the following: 'as to individuals.'" Senate Journal, May 15, 1969, pp. 1407-8.

The added words were placed in italics in accordance with routine legislative practice, which contemplates that in the case of amendments, new material is to be italicized. The rules of the Senate of the 76th General Assembly provided: "All resolutions originated in the Senate proposing amendments to the Constitution shall be ordered printed and shall be printed in the same manner in which bills are printed." (Senate Journal, Feb. 18, 1969, p. 163.) And as to bills, they provided: "Senate Bills and House Bills in the Senate shall be printed with new matter in italics and omitted or superseded matter enclosed in brackets and underlined." Senate Journal, Feb. 18, 1969, p. 161.

There is thus no underpinning for the argument that the General Assembly intended that the word "individuals" should be given an artificial meaning. The official explanations, which are not discussed in the Maynard brief, definitely negative such an intention. We have examined the other materials to which the Maynard and Shapiro plaintiffs have referred, but have found nothing which persuades us that the words of Article IX-A should be given anything other than their natural meaning.

We conclude that the meaning of Article IX-A is that ad valorem taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited.

The Maynard case plaintiffs and all of the Shapiro case plaintiffs, with the exception of Shapiro, contend that Ar-

ticle IX-A, so construed, violates the equal protection clause of the fourteenth amendment to the constitution of the United States. Lake Shore contends that it is the Revenue Act, which must be regarded as amended by Article IX-A, rather than the Article itself, which violates the equal protection clause. We shall first consider the basic question of the validity of the discrimination effected by Article IX-A.

The new Article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed. Of course, the equal protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the states in drawing the lines between classes. Nevertheless, a state may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated.

The Supreme Court of the United States has thus described the governing principles:

“If course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237;

Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293; * * * *State Board of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co. v. Conway*, supra, 281 U.S., at 159.

"But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of legislation.' *Royster Guano Co. v. Virginia*, 253 U.S. 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 37; *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160 * * *."

Allied Stores of Ohio, Inc. v. Bowers, (1959), 358 U.S. 522, 526-27, 79 S. Ct. 437, 3 L. Ed. 2d 480, 484-85.

When classifications are reasonable, it is because of differences in the nature of the property or in the use to which it is put. The nature of the tax is important, too, for what may be a reasonable classification for a license, or for a privilege tax, is not necessarily a reasonable classification for a property tax.

Mr. Justice Brandeis stated the criterion this way in his dissenting opinion in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406, 48 S. Ct. 553, 72 L. Ed. 927, 932: "In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civ-

ilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible."

Article IX-A must be read against the scheme of property taxation established pursuant to Article IX of the Constitution of 1870, which, with respect to property taxes contemplates the levy of "a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." (Constitution of 1870, Article IX, Sec. 1.) Taxes levied by municipal corporations are required to be "uniform in respect to persons and property, within the jurisdiction of the body imposing the same." (Constitution of 1870, Article IX, Sec. 9.) The permissible exemptions from taxation are thus described. "The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horitcultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. * * *" Constitution of 1870, Article IX, Sec. 3.

Against this background the incongruity of the prohibition contained in Article IX-A is apparent. It cannot rationally be said that the prohibition promotes any policy

other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others. For the purpose of a tax by valuation upon the ownership of real or personal property, the identity of the owner is a neutral consideration, as is his status as sole proprietor, joint tenant, tenant in common, partner (Ill. Rev. Stat. 1969, ch. 106½, par. 25), limited partnership (Ill. Rev. Stat. 1969, ch. 106½, par. 61), member of a professional service corporation (Ill. Rev. Stat. 1969, ch. 32, par. 415-1 *et seq.*), or of a professional association (Ill. Rev. Stat. 1969, ch. 106½, par. 101 *et seq.*; see Sup. Ct. Rule 721; 43 Ill. 2d, Rule 721).

We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the fourteenth amendment. Apart from that discrimination, the validity of the Revenue Act is not challenged, and we hold that it is Article IX-A which must fall. The validity of Article IX of the Constitution and of the Revenue Act are therefore not affected.

The judgment of the circuit court of Cook County in No. 44199 (Lake Shore) is reversed, and the cause is remanded to that court with directions to dismiss the complaint. Insofar as the judgment of the circuit court in No. 44432 (Shapiro) dismissed the complaint as to all of the plaintiffs other than Clemens K. Shapiro, it is affirmed; insofar as that judgment sustained the complaint as to Clemens K. Shapiro, it is reversed and the cause is remanded to that court with directions to dismiss the complaint. In No. 44308 (Maynard), the complaint is dismissed.

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No. 44199. *Reversed and remanded with directions.*

No. 44432. *Affirmed in part; reversed in part, and remanded with directions.*

No. 44308. *Complaint dismissed.*

(Lake Shore Auto Parts Co. v. Korzen, Nos. 44199, 44308, 44432)

APPENDIX B

STATE OF ILLINOIS SS
COUNTY OF COOK

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, CHANCERY DIVISION

LAKE SHORE AUTO PARTS CO.,
an Illinois corporation, on its own
behalf and also as representative of a
class of corporations and other "non-
individuals", which class is herein de-
scribed,

Plaintiffs,

vs.

BERNARD J. KORZEN, County
Treasurer and ex-officio County Col-
lector of Cook County, GEORGE E.
KEANE and HARRY H. SEMROW,
Members of the Board of Appeals of
Cook County, P. J. CULLERTON,
County Assessor of Cook County,
EDWARD J. BARRETT, County
Clerk of Cook County, and ROBERT
J. LEHNHAUSEN, Director, Depart-
ment of Local Government Affairs of
the State of Illinois,

Defendants.

No. 70 CH 5123

ORDER

This cause coming on to be heard upon the Motion for Summary Judgment of LAKE SHORE AUTO PARTS CO., an Illinois corporation, plaintiff, by and through its attorneys, ORLIKOFF, PRINS, FLAMM & SUSMAN, and upon the Cross-motion For Summary Judgment of defendant ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois, by and through the Attorney General of Illinois, and the Cross-motion For Summary Judgment of defendants KORZEN, KEANE, SEMROW, CULLERTON and BARRETT, assessing and taxing officials of Cook County, by and through the State's Attorney of Cook County,

The Court having examined the pleadings and memoranda filed by the parties hereto, having heard the arguments of counsel and being fully advised in the premises

DOES HEREBY FIND:

1. That there is no genuine issue as to any material fact in this cause, and it is therefore appropriate and proper that the cause be determined on the Motion and Cross-motions For Summary Judgment.

2. That the plaintiff, LAKE SHORE AUTO PARTS CO., is a corporation duly organized and existing under the laws of Illinois, and on April 1, 1970, was the owner of personal property having a taxable situs in the County of Cook, which property has been included on the assessment role now being prepared by the assessing officials of Cook County for the tax year 1970; that the plaintiff has standing to bring this action on its own behalf, and it is not at this time necessary or appropriate to determine whether the action is properly brought and maintained as a class action or to determine the definition of the plaintiff class.

3. That an amendment to the Illinois Constitution of 1870, designated as Article IX-A, was approved by the people of Illinois at a reference held on November 7, 1970, and such amendment, by its terms, became effective January 1, 1971; that said Article IX-A purports to prohibit the taxation of personal property by valuation as to "individuals", and only as to "individuals", while leaving unaffected those provisions of the Illinois Constitution and the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, §482 et seq.) which impose such personal property taxes as to property owned by corporations and other "non-individuals".

4. That said Article IX-A is self-executing, and the necessary effect of the adoption thereof is to amend the various provisions of the Revenue Act of Illinois, specifically including but not limited to §18 thereof (Ill. Rev. Stat. 1969, ch. 120, §499), so as to exempt from personal property taxes thereby imposed all personal property owned by "individuals", while retaining such taxes as to personal property owned by corporations and other "non-individuals."

5. That the Revenue Act of Illinois, as so amended by Article IX-A of the Illinois Constitution, deprives the plaintiff corporation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States: that said Revenue Act of Illinois, to the extent that it purports to impose personal property taxes with respect to the property owned by plaintiff, is therefore unconstitutional, void and of no effect whatsoever.

6. That Article IX-A of the Illinois Constitution is not applicable with respect to personal property taxes imposed by the Revenue Act of Illinois for the year 1970, the as-

assessment date for which was April 1, 1970, and the assessment of which had been commenced prior to January 1, 1971, the effective date of Article IX-A, notwithstanding that such assessment had not been completed as of that date.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

7. The plaintiff's Motion for Summary Judgment is granted in part and denied in part, the Court declaring that the Revenue Act of Illinois (Ill. Rev. Stat. 1969, ch. 120, §§ 482 et seq.), said Revenue Act having been amended by Article IX-A of the Illinois Constitution, is violative of the Fourteenth Amendment to the Constitution of the United States and is held to be void and unenforceable insofar as said Revenue Act purports to impose personal property taxes on plaintiff.

8. The defendants' Cross-motions For Summary Judgment are granted in part and denied in part, the Court declaring that Article IX-A of the Illinois Constitution is not applicable to, and does not impair the collection of, personal property taxes imposed by the Revenue Act of Illinois, the assessment of which were commenced prior to January 1, 1971.

9. Except for those matters adjudicated by paragraphs 7 and 8 of this Order, this Court retains jurisdiction of this cause for all purposes.

10. Pursuant to Rule 304(a) of the Rules of the Supreme Court of Illinois, the Court expressly find that there is no just reason for delaying enforcement or appeal of this Order. In the event of an appeal from this Order, the Court is of the opinion that the interests of justice would be best served by hearing and deciding the appeal as expeditiously as possible because of the manifest pub-

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lie importance of the issues and the substantial amount of tax revenues that are involved.

DATED: March 30, 1971.

ENTER:

JUDGE WALTER P. DAHL,
Judge, Circuit Court of
Cook County, Illinois

APPENDIX C

STATE OF ILLINOIS SS
COUNTY OF COOK

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, TAX DIVISION

CLEMENS K. SHAPIRO, JEROME
HERMAN, d/b/a THE SPOT, GUY
S. ROSS AND EUGENE R. ROSS,
d/b/a GUY S. ROSS & CO., a part-
nership; and M. WEIL AND SONS,
INC., an Illinois Corporation, all in-
dividually and in representative ca-
pacity,

Plaintiffs,

vs.

EDWARD J. BARRETT, County
Clerk of Cook County; BERNARD
J. KORZEN, County Treasurer and
ex-officio County Collector of Cook
County; GEORGE E. KEANE and
HARRY H. SEMROW, Members of
the Board of Appeals of Cook County;
P. J. CULLERTON, County Assessor
of Cook County, and ROBERT J.
LEHNHAUSEN, Director, Depart-
ment of Local Government Affairs of
the State of Illinois,

Defendants.

No. 71 L 5745

ORDER

This cause appears before this Court on plaintiffs' Complaint for Declaratory Judgment, filed pursuant to Chapter 110, Section 57.1 of the Civil Practice Act. The action was filed by plaintiffs for themselves and in a representative capacity on behalf of all other persons similarly situated. The cause comes on for hearing on separate motions, to strike and dismiss that complaint, filed by County and State defendants. Defendants have elected to stand on their motions.

No genuine issue as to any material fact emerges.

The plaintiffs are:

1. Clemens K. Chapiro, is a natural person, citizen and taxpayer of the State of Illinois, resident of and a salaried employee in the County of Cook wherein he owns personal property in his own name, and owns real property jointly with his wife, none of which property is owned or used in the operation of, or for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family.
2. Jerome Herman, is a natural person, and a citizen of the State of Illinois, and as sole proprietor owns, operates and conducts a business located in Cook County, Illinois, and is the owner of property and a taxpayer herein.
3. Guy S. Ross and Eugene D. Ross, natural persons, citizens and residents of the State of Illinois, both of whom are partners, and as partners operate and conduct a business as a partnership duly organized under the laws of the State of Illinois, which busi-

ness entity is located in the County of Cook and is the owner of property and a taxpayer therein.

4. M. Weil and Sons, Inc., a corporation duly organized and existing under the laws of the State of Illinois, is located in, and is the owner of property situated in the County of Cook and a taxpayer therein.

Each of the plaintiffs is an owner of property subject to the ad valorem tax directed to be imposed by Article IX of the Illinois Constitution of 1870, and imposed by the Illinois Revenue Act of 1939, which property has been assessed by valuation and continues to be so assessed by defendants pursuant to that constitutional and statutory authority.

The electorate of this State, on November 3, 1970, adopted amending Article IX-A to the Illinois Constitution of 1870. This amendment became part of the Illinois Constitution on November 25, 1970, and reads as follows:

"Article IX-A

TAXATION OF PROPERTY

§ 1. Taxation of personal property prohibited

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*"

"SCHEDULE

"Paragraph 1. This amendment shall become effective January 1, 1971."

Plaintiffs contend as follows:

All plaintiffs contend that Illinois Constitution of 1870, as amended by the addition of Article IX-A, specifically prohibits, and declares to be unconstitutional the imposition, in Illinois, of the property taxes imposed by Ar-

ticle IX, Section 1, on *all* forms of property, real and personal or other, regardless of the ownership of that property or the use to which that property is put by its owner.

All plaintiffs contend that if Article IX-A does not prohibit the taxation of all property, then Article IX-A prohibits the tax to be measured by the value of the property taxed.

All plaintiffs contend that the prohibition of Article IX-A, which abolishes the imposition of property tax measured by valuation of the property taxes, extends to those taxes so measured where the assessment of plaintiffs' property has been commenced by defendants prior to, even though not completed on January 1, 1971, the effective date of Article IX-A, and payment due thereafter.

Natural Persons contend that:

The designation "individuals" in Article IX-A properly and validly describes, is intended to apply, and does apply solely to them; and the taxation by valuation prohibited in Article IX-A, if not applicable to all property owned by them, is applicable to personal property owned by them and used by them for their personal purposes; and that,

Article IX-A prohibits taxation, by valuation of personal property as to them alone, while denying that prohibition as to all others, is proper, valid, and constitutional under both Illinois Constitution and the Constitution of the United States.

Both business entities and corporations contend that:

Article IX-A, effective January 1, 1971, as an amendment to Illinois Constitution of 1870 is offensive to the Constitution of the United States.

If the designation "individuals" in Article IX-A invokes prohibition of taxes by valuation on personal property exclusively as to "natural persons" and personal property owned by them, but denies the same prohibition to business entities and corporations, then such classification is discriminatory, unreasonable and offensive both to Illinois Constitution and the Constitution of the United States. This is true for the reasons that such classification is invalidly predicated upon purported differences between *users* of identical property and the *use* to which that property is put, instead of differences found to exist between the forms of the property upon which that tax is directly laid. The employment of such base constitutes special legislation prohibited by Article IV, Section 22 of Illinois Constitution, as well as denying to business entities and corporations due process of law and the equal protection of the law guaranteed to them by Article II, Section 2 of the Illinois Constitution, and the Fourteenth Amendment to the Constitution of the United States.

Unless the exclusion of property owned by "individuals" is construed to exclude the property of business entities and corporations, as well as that of natural persons, then the employment in Article IX-A of the term "individuals" is so vague, uncertain, and incapable of definitive application to the context of Article IX, that Article IX-A must fall because it is totally absent the comprehension required, especially of constitutional provisions, by both Illinois Constitution and the Constitution of the United States.

Business entities contend that:

(a) The designation "individuals" in Article IX-A is correctly and properly described, and is intended to apply to, and does include business entities which own property because the natural person owners of that business en-

tity are personally and individually liable for the payment of that tax.

Article IX-A prohibiting taxation by valuation of property owned by such business entities, while denying that prohibition as to corporations is proper, valid and constitutional under both Illinois' Constitution and the Constitution of the United States.

Corporations contend that:

If the designation "individuals" in Article IX-A applies to any or all owners of property except corporate owners of property, then such classification is discriminatory, unreasonable, and offensive to both the Illinois Constitution and the Constitution of the United States.

Defendants contend that the taxation by valuation of real property and other property, as provided in Article IX shall continue and remain, in all regards, unaffected by Article IX-A; however:

Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited only as to natural persons; but as to them, only as to the personal property owned by them; but as to that personal property owned by them, only such of that property which is used by them for the personal enjoyment of themselves and their families.

This matter appearing on the pleadings aforesaid, presenting the issues to this Court as delineated by those pleadings, and the Court having heard arguments by all parties in support of their respective positions, **THIS COURT FINDS:**

1. That a genuine cause and controversy exists, and that this action is properly maintained under the provisions of

Chapter 110, Section 57.1 (Declaratory Judgments), Civil Practice Act, Illinois Revised Statutes, 1969.

2. Each of these plaintiffs has standing to bring this action in his or its own behalf and is a proper representative of his class.

3. That this action is properly maintained as a class action, and the members of those classes are adequately and competently represented by counsel herein.

4. That Article IX-A of the Illinois Constitution of 1870 is valid, constitutional and immune to all of the plaintiffs' assaults, both under the Illinois Constitution and the Constitution of the United States.

5. That Article IX-A is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families.

6. That these findings by this Court make it unnecessary to consider contentions made by plaintiffs in the alternative.

7. That all issues as found heretofore are found in favor of the defendants, except as to those issues relating to the plaintiff Clemens K. Shapiro and members of his class involving personal property owned and used by them for the personal enjoyment of themselves and their families.

8. That motions to strike and dismiss plaintiffs' Complaint are sustained in regards and in respect of those found in favor of the defendants, except as to those issues raised by plaintiff Clemens K. Shapiro and members of his class involving personal property owned and used by

them for the personal enjoyment of themselves and their families.

9. Pursuant to Rule 304(a) of the Rules of the Supreme Court of Illinois, the Court expressly finds that there is no just reason for delaying enforcement or appeal of this Order. In the event of an appeal from this Order, the Court is of the opinion that the interests of justice would be best served by hearing and deciding the appeal as expeditiously as possible because of the manifest public importance of the issues and the substantial amount of tax revenues that are involved.

WHEREFORE, IT IS ORDERED, ADJUDGED and DECREED that defendants' motions to strike and dismiss are sustained as to all plaintiffs, except the plaintiff Clemens K. Shapiro and members of his class, and plaintiffs' Complaint is stricken as to all issues and in all regards and respects contrary to and in variance with the judgment of this Court; that Amending Article IX-A of the Illinois Constitution is valid and constitutional in all respects and is immune to attack under any provision or provisions of the Illinois Constitution of 1870 and the United States Constitution, and that said Amending Article IX-A declares its prohibition exclusively as to any personal property tax on the personal property owned by individuals and used for their personal enjoyment and that of their families.

ENTER:

THOMAS C. DONOVAN,
Presiding Judge, Tax Division,
Circuit Court of Cook County,
Illinois.

Date: May 27, 1971

APPENDIX "D"

MR. JUSTICE DAVIS, dissenting:

The majority opinion holds that our State Constitution of 1870, as modified by Article IX-A, may not validly classify exemptions from ad valorem personal property taxation on the basis of the ownership of the property, and that such exemption may be made only upon a classification based upon the nature of the property or its use. I dissent from this pronouncement.

It is clear that the United States Constitution imposes no particular modes of taxation upon the states and leaves them unrestricted in their power to tax those domiciled within their borders so long as the tax imposed is upon property within the state, or on privileges enjoyed there, and so long as the tax is not so palpably arbitrary or unreasonable as to infringe upon the equal protection and due process requirements of the fourteenth amendment. *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 284, 52 S. Ct. 556, 559, 76 L. Ed. 1102, 1105.

The majority opinion recognizes that "the equal protection clause of the fourteenth amendment does not prohibit classification, and absolute precision is not required of the states in drawing the line between classes"; and that, "nevertheless, a state may not, under the guise of classification, arbitrarily discriminate against one and in favor of another similarly situated." This general rule is found in the quotation from *Allied Stores of Ohio v. Bow-*

ers, 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480, cited by the majority. The rule has been expressed and exemplified many times in varying terms. Examples are: "Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action." (*Welch v. Henry*, 305 U.S. 134, 144, 59 S. Ct. 121, 124, 83 L. Ed. 87, 92); "It is a salutary principle of judicial decision, * * * that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." (*Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584, 55 S. Ct. 538, 540, 79 L. Ed. 1071, 1073.) Due process imposes no rigid rule of equality in taxation, and irregularities resulting from singling out one particular class for taxation or exemption infringe no constitutional requirement. (*Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 57 S. Ct. 868, 872, 81 L. ed. 1245, 1253). It is only the invidious discrimination or classification which is patently arbitrary and utterly lacking in rational justification which is barred by the due process or equal protection clauses. *Flemming v. Nestor*, 363 U.S. 603, 611, 612, 80 S. Ct. 1367, — 4 L. ed. 2d 1435, 1445.

The variety of ways of expressing the rule that a legislative classification for taxation purposes is not violative of the fourteenth amendment if it has a reasonable relation to the subject of the particular legislation so that all

persons similarly situated are treated alike, and pertinent citations, are found in 16A C.J.C. Constitutional Law, Sections 520, 521, 649.

In this litigation, as is often the case, the particular expression of the rule which the majority of the court choose to rely upon may be dictated by the outcome which the judge of the majority think to be proper. Beyond doubt, the fourteenth amendment does not impose on the states an inflexible and technical rule of equal taxation, and the extent to which the states may go in devising a legislative classification for taxation is illustrated by the statement of the Supreme Court in *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 284, 285, 52 S. Ct. 556, 559, 76 L. ed. 1102, 1108:

“The equal protection clause does not require the state to maintain a rigid rule of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity; and possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious, do not fall within constitutional prohibitions.”

The Supreme Court in *Lawrence* also stated that there is no constitutional requirement that a system of taxation should be uniform as applied to individuals and corporations, regardless of the circumstances in which it operates (286 U.S. 276, 283, 52 S. Ct. 556, 558, 76 L. ed. 1107), and we have just recently held that for the purpose of income taxation, corporations may be placed in one class and individuals in another and each taxed differently. (*Thorpe v. Mahin*, 43 Ill. 2d 36.) The language of the court at pages 45 and 46 is worthy of repetition.

“It is next contended that the Act violates the uniformity provision of Section 1 of Article IX of our constitution and the equal protection and due process

requirements of the fourteenth amendment to the United States constitution by creating multiple classes and discriminating unreasonably among them. This contention is advanced specifically against the provisions which tax corporations at a 4% rate and individuals, trusts, and estates at 2½% rate.

"Both the equal protection argument and the uniformity argument depend on the reasonableness of putting corporations in one class and individuals, trusts, and estates in another class for purposes of this tax. (See *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289). When the due process contention has been advanced, this court, citing Supreme Court cases, has stated: 'It has long been settled that the power of the legislature to make classifications, particularly in the field of taxation, is very broad, and that the fourteenth amendment imposes no "iron rule" of equal taxation. (Citations.) The reasons justifying the classification, moreover, need not appear on the face of the statute, and the classification must be upheld if any state of facts reasonably can be conceived that would sustain it. (Citations.) The burden therefore rests on one who assails the statute to negate the existence of such facts. (Citations.)' *Department of Revenue v. Warren Petroleum Corp.*, 2 Ill. 2d 483, 489-490.

"When the uniformity contention has been advanced this court has stated: 'It is well established that the legislature has broad powers to establish reasonable classifications in defining subjects of taxation. * * * Such classification must, however, be based on real and substantial differences between persons taxed and those not taxed. (Citations.)' (*Klein v. Hulman*, 34 Ill. 2d 343, 346-347.) 'In order to prevail on an allegation that a statute or portion of a statute is unconstitutional, the plaintiff has the burden of showing how the legislature has violated the constitution.' *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289, 291.

"In short, petitioners have the burden of showing that the challenged classification is unreasonable. Their

only assertion is that 'corporations are at a disadvantage when they compete in the same type of business with individual proprietorships or partnerships because of the rate differential.' This assertion has been rejected by the Supreme Court as to a Federal tax (*Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed. 389), and as to a State tax (*Fort Smith Lumber Co. v. Arkansas ex rel. Arbuckle*, 251 U.S. 532, 40 S. Ct. 304, 64 L. Ed. 396), and by this court (*People v. Franklin National Insurance Co. of New York*, 343 Ill. 336; *Michigan Millers Mutual Fire Insurance Co. v. McDonough*, 358 Ill. 575), where, for purposes of the tax in question, corporations were placed in one class and individuals in another and each were taxed differently."

The majority, however, holds that as to a property tax the classification for exemption or taxation may not be based upon the character of the ownership, but only upon the nature of the property itself. Thus, the majority is of the opinion that the classification may not be based upon the corporation—individual distinctions which we upheld in *Thorpe*.

In *Thorpe* this court reversed its prior holding that income is property (*Bachrach v. Nelson*, 349 Ill. 579), and held that an income tax was not a property tax. The significance of this determination was that Section 1 of Article IX of our Constitution of 1870 required the levying of a tax "by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property * * *." At the same time, the constitutional provisions permitted a tax upon franchises and privileges in such manner as the legislature might direct, so long as it was uniform as to each "class." Obviously, the legislature could not, under the foregoing provisions, impose

an income tax upon corporations at one rate and upon individuals at a lesser rate if it were a tax on property. Our constitution then prohibited any tax on property unless structured to be uniform as to valuation.

After reaching the conclusion that an income tax was not a property tax, the court faced no barrier in upholding the Illinois Income Tax Act. In the case at bar, after Article IX-A amendment to the Constitution of 1870 was adopted, the uniformity provisions of Section 1 of Article IX were no longer effective as to the taxation of personal property of individuals, and the court should have found no impediment to upholding the validity of Article IX-A and the abolishment of this tax as to individuals.

Constitutional provisions requiring property to be taxed uniformly in proportion to its value are not uncommon to the states. In the California Railroad Tax cases (*San Mateo County v. Southern Pacific R. Co.*, 13 Fed. 722, appeal dismissed per stipulation, 116 U.S. 138; *Santa Clara County v. Southern Pacific R. Co.*, 18 Fed. 385, aff'd other grounds, 118 U.S. 394), which held that unequal taxation, based upon the character of the owner, was forbidden by the fourteenth amendment, a constitutional provision requiring uniformity of taxation was involved. Even though the California constitution specified that all property be taxed in proportion to its value, a state statute especially provided that as to railroad properties only, the amount of a mortgage on the real estate was not to be deducted in ascertaining the value of the real estate for taxation purposes. The trial court quite properly held that this method of valuation, as to railroads only, was improper under the circumstances, and the United States Supreme Court affirmed the lower court on a non-constitutional basis without reaching the constitutional question. The California

Railroad Tax cases should be read, with cognizance, that the state constitution required all property to be taxed in proportion to its value, and that the cases arose at a time when it was necessary to establish that the word, "persons" as used in the fourteenth amendment, included corporations. Apparently, the latter point had a strong bearing on the expressions found in these cases.

In the case at bar, by virtue of the adoption of Article IX-A, there is no constitutional requirement that taxes on personal property be uniform as to individuals and corporations so that each pays a tax in proportion to the value of his or its property. Article IX-A, which we are called upon to consider, eliminated this requirement; it provides that "the taxation of personal property is prohibited as to individuals." Thus, the case at bar is a far cry from one in which the legislature is attempting to discriminate between individuals and corporations in the face of a constitutional provision prohibiting such discrimination. Here the question for determination is whether, absent the requirement of a state constitution that corporate and individual personal properties be taxed the same, the equal protection clause of the fourteenth amendment permits them to be taxed differently? I believe that it does!

Without the constitutional requirement of uniformity on the taxation of properties, there is no reason or justification in the case at bar for stating that personal property taxation may not be classified on the basis of the ownership of the property. The Constitution of 1870, as amended by Article IX-A, does not so provide, and the Constitution of 1970 suggests the contrary. Article IX of the Constitution of 1970 relates to revenue, and Section 5 thereof pertains to personal property taxation. Subsection (a) thereof provides that the legislature "may clas-

sify personal property for purpose of taxation by valuation, abolish such taxes on any or all *classes* and authorize the levy of taxes in lieu of the taxation of personal property by valuation." (Emphasis ours.) Without more, it could be said that the word "classes" refers only to classes of property, but subsection (c) refers to the abolition of all ad valorem personal property taxes by January 1, 1979, and the replacement of the lost revenue, and provides: "Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those *classes* relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971." (Emphasis ours.) Obviously, the word "classes" as there used, does not refer to classes of property; it refers to classes of property owners, and provides for taxation according to the character of the owner. If the majority opinion is to stand and Article IX-A held to be unconstitutional, then under consistent application of its rationale, subsection (a) of Section 5 of the new constitution is likewise unconstitutional.

The majority opinion chose to rely upon the rationale of *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. ed. 927. I believe that the elucidation and logic of the dissent of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, offers the better reason. Therein, Mr. Justice Brandeis made some observations which are particularly apropos here. The court had under consideration a tax on the gross receipts of corporate taxicab companies where no similar tax was imposed upon the receipts of individuals who operated taxicabs. The majority held that the classification was based solely upon the character of the owner, and that it violated the fourteenth amendment.

In his dissenting opinion, 277 U.S. 389, 403-412, 48 S. Ct. 553, 555-558, 72 L. ed. 927,—, Mr. Justice Brandeis observed that the tax applied equally to all corporations, foreign and domestic. He stated that the fundamental question before the court was:

“Does the equality clause prevent a state from imposing a heavier burden of taxation upon corporations engaged exclusively in intrastate commerce, than upon individuals engaged under like circumstances in the same kind of business? The narrowed question presented is whether this heavier burden may be imposed by a form of tax ‘not peculiarly applicable to corporations’; that is, by a tax of such a character that it might have been extended to individuals if the Legislature had seen fit to do so.”

He then pointed out that the difference between a business carried on in corporate form and one carried on by natural persons is “a real and important one.” He observed that the discrimination was not based upon any difference in the source of income or in the character of the property employed, and stated the obvious: that the requirement that a classification must be reasonable does not imply that the policy embodied in the classification must be deemed by the court to be a wise one. He concluded that a state is permitted to impose upon corporations more than their pro rata share of the burden of taxation, and that nothing in the Federal constitution prohibits this.

It seems that this is exactly what we held in *Thorpe v. Mahin*, 43 Ill. 2d 36. We recognized what we called the obvious advantages of carrying on a business in the corporate form. The privilege of carrying on a business in this form has many advantages: the corporate ownership of property, freedom from personal liability for corporate obligations, continuity of existence, etc. There we acknowl-

edged that there are sufficient differences between the privilege of earning or receiving income as a corporate entity and that of earning or receiving income as an individual, to justify the variance in tax rates between the individual and the corporation, and here we should recognize that there are sufficient differences between the privilege of owning property as a corporate entity and the privilege of owning it as an individual to justify the exemption in the case of the individual property owner. The fact that the corporation may in some respects be placed at a disadvantage in its competition with individuals owning similar property and engaged in the same business should not condemn the classification as unreasonable. *Thorpe v. Mahin*, supra, 46.

There is no more compelling reason to suggest that the classifications for personal property tax purposes must be based upon the nature of the property than there is to suggest that the classifications for income tax purposes must be based on the source or type of income to be reported. The Article IX-A constitutional amendment creates a classification based upon the distinctions inherent between corporations and individuals—a distinction which we have recognized and upheld as valid under the equal protection clause requirement of the fourteenth amendment in *Thorpe v. Mahin*.

Another matter is worthy of mention in our consideration of this case. The evils and the inequities in the administration of the personal property tax collections in this State are known to everyone. That these inequities apply with equal force to corporate taxpayers and individual taxpayers may, or may not, be totally true. The desire and purpose of systematically eliminating this archaic form of taxation are apparent from the actions of the

people and the legislature of the State. The General Assembly, which drafted and adopted Senate Joint Resolution No. 30, had previously at the same legislative session already exempted from such taxation, household furniture and one automobile, per household, used for personal pleasure. (Ill. Rev. Stat. 1969, ch. 120, par. 500.21a.) The Article IX-A amendment was overwhelmingly ratified by the people of the State. The Constitution of 1970, likewise adopted by the vote of the people, expressed their concern over the form and use of personal property taxation. The newly-adopted constitution prohibits the reinstatement of any ad valorem personal property tax abolished before July 1, 1971, the effective date of the new constitution. This provision refers to the personal property tax as to individuals which was abolished by Article IX-A, and the majority opinion runs counter to this constitutional prohibition in that it reinstates the personal property tax as to individuals. In addition, the new constitution provides that all ad valorem personal property taxes shall be abolished on or before January 1, 1979.

The obvious spirit of the Article IX-A amendment, the will of the people, as expressed by its adoption, and the intent and purpose of the legislature, should not be thwarted unless a construction to this effect is required. Thus, it is very appropriate that we consider the mischief sought to be remedied and the purpose to be accomplished by the Article IX-A amendment. (*Wolfson v. Avery*, 6 Ill. 2d 78, 88). Likewise, the court should memorialize the salutary rule of law that an amendment to a state constitution should be deemed violative of the Federal Constitution only where the asserted constitutional rights cannot otherwise be protected and effectuated. *Reynolds v. Sims*, 377 U.S. 533, 584, 84 S. Ct. 1362; —, 12 L. ed. 2d 506, 540.

After considering the background of this constitutional amendment and the purpose which it, along with the other contemporary legislative enactments and constitutional adoptions seeks to accomplish, I believe that the classification found in the Article IX-A amendment does not constitute an invidious discrimination; that it seeks to accomplish and promote a valid policy expressive of the will of the people and the intent and purpose of the legislature; and that the distinction upon which the classification for exemption is based does not overstep the limitations imposed by the fourteenth amendment.



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NO. 71-685, NO. 71-691

Supreme Co

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E. ROBERT SEAN

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS CO., et al.,

Respondent.

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

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CLEMENS K. SHAPIRO, et al.,

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**CONSOLIDATED RESPONSE OF
LAKE SHORE AUTO PARTS CO.
TO PETITIONS FOR WRIT OF CERTIORARI
IN CASES NOS. 71-685 & 71-691**

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IN THE
SUPREME COURT OF THE UNITED STATES
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Pursuant to request of the Court, as transmitted in a letter from the Clerk dated February 4, 1972, Lake Shore Auto Parts Co. ("Lake Shore"), Appellant in No. 71-674 and Respondent in Nos. 71-685 and 71-691, submits herewith its Response to the Petitions for Certiorari filed by

the Director of the Department of Local Government Affairs of the State of Illinois (No. 71-685) and by various Cook County taxing officials (No. 71-691).

I.

Lake Shore surmises that the Court's request for additional responses may be for the purpose of clarifying some possible confusion as to the positions taken by the various parties to this litigation. Any such confusion is largely attributable to the circumstance that the various parties seeking or opposing review in this Court advocate at least three different views as to how the case should have been decided below.

Confusion has been compounded by the fact that the Petition in No. 71-691, in its entirety, and the Petition in No. 71-685, in large part, are devoted to non-federal questions and to issues of local public policy with which this Court presumably has no concern, and which serve only to distract attention from the important federal constitutional questions engendered by the decision of the Illinois Supreme Court.

The history of the litigation and the positions taken by the various litigants in the lower courts are set out in the opinion of the Illinois Supreme Court and need not be repeated here. It should be emphasized that both the *Maynard* case and the *Shapiro* case were filed while the original action (*Lake Shore v. Korzen*) was pending on appeal in the Illinois Supreme Court, and each was instituted in an obvious effort to influence the outcome of the *Lake Shore* case.

The parties who have filed appearances in this Court, and the positions advocated by each of them are as follows:

(1). Lake Shore, Appellant in No. 71-674, contends that both the trial court and the State Supreme Court were correct in holding that the equal protection clause of the 14th Amendment to the United States Constitution prohibits a state from discriminating, for ad valorem property tax purposes, as between property owned by corporations on the one hand, and identical property owned by "individuals" on the other hand, — at least where no rational basis for the discrimination can be shown to exist. Lake Shore contends, however, that the *remedy* adopted by the Illinois Supreme Court (in contrast to that adopted by the trial court) does raise a serious federal constitutional question. By invalidating Article IX-A of the Illinois Constitution, and thus restoring personal property taxation on all Illinois taxpayers, that Court deprived Lake Shore of the fruits of its victory. If the holding is allowed to stand it will effectively foreclose or "chill" the future enforcement of equal protection rights, at least in the field of taxation. No taxpayer will have any incentive to challenge an unconstitutionally discriminatory tax if he knows that a successful outcome will provide no significant tax saving for him.

Lake Shore's position is set forth in its Jurisdictional Statement in No. 71-674, and also in its Brief in Opposition to the *Maynard* plaintiffs' Consolidated Motion to Strike.

(2). The *Maynard* plaintiffs, who appear in this Court as alleged Appellees in No. 71-674, and as alleged Respondents in Nos. 71-685 and 71-691¹, consist essentially of

¹ For the reason set forth at page 2 of Lake Shore's Brief in Opposition to Appellees' Coonsolidated Motion to Strike, Lake Shore believes that the *Maynard* plaintiffs have no status or standing to appear in this Court.

four Cook County school districts (joined, peculiarly, by one individual who represents himself to be a "taxpayer").

The *Maynard* plaintiffs are the only parties who are satisfied with the result reached by the Illinois Supreme Court. The reason for their satisfaction is self-evident. As tax-using entities, their interest, as they see it, lies in preserving the *status quo* at all costs. The decision of the Illinois Supreme Court assures them of the continued receipt of revenues from the personal property tax on both individuals and corporations, and means that they will not have to take their chances on the state legislature finding alternative sources of revenue to replace all or any part of this traditional financing source. It is evidently of no concern to the *Maynard* plaintiffs that the People of Illinois, the Illinois General Assembly, the Governor of Illinois, the Attorney General of the State and prominent academic authorities are in unanimous agreement that the personal property tax, as administered in Illinois, is arbitrary, inequitable, disgraceful and scandalous.

The *Maynard* plaintiffs purport to concur with the position of Lake Shore as to the unconstitutionality of the discriminatory taxing scheme, — although not, of course, with Lake Shore's views as to the unconstitutionality of the remedy adopted by the Illinois Supreme Court. Lake Shore, however, does not consider the *Maynard* plaintiffs to be trustworthy allies. The reason for Lake Shore's suspicion lies in the fact that receipts from personal property taxation of "individuals" in Cook County comprise but a minute fraction of the total personal property tax yield.² The school districts would stand to lose very little if this Court

² See footnote 2 at page 2 of Lake Shore's Brief in Opposition to Appellees' Consolidated Motion to Strike.

were to reverse the Illinois Supreme Court on the substantive constitutional issue and uphold the validity of the discrimination as between corporations and individuals. In such event the school districts would continue to receive the great bulk of personal property tax revenue from corporations, including Lake Shore.

The position of the *Maynard* plaintiffs is set forth in their Consolidated Motion to Strike and Brief in Opposition.

(3). Robert J. Lehnhausen, the Director of the Department of Local Government Affairs of the State of Illinois, Petitioner in No. 71-685, represented by the Attorney General of Illinois, takes the position that the Illinois Supreme Court, and the Circuit Court as well, erred in holding that the discrimination as between corporations and individuals is violative of the equal protection clause. He would have this Court restore Article IX-A to the Illinois Constitution while leaving the taxing statute itself intact, thereby permitting personal property taxes to be assessed on the personal property of corporations but not of individuals. His position is set forth in his Petition for Certiorari. He has thus far filed no response to the Petition in No. 71-691, nor to Lake Shore's Jurisdictional Statement in No. 71-674.

(4). The Cook County taxing officials, represented by the State's Attorney of Cook County, were defendants in the case of *Lake Shore v. Korzen*, and were also named as defendants in *Shapiro v. Barrett*. They have not sought review of the *Lake Shore* case, although obviously dissatisfied with the results thereof, but have instead filed a Petition for Certiorari in the *Shapiro* case, No. 71-691. The result they urge in that Petition is essentially the same as that sought by the Attorney General in No. 71-685,

but is reached by a much different and far more obscure route. The Petitioners in No. 71-691 apparently believe that the adoption of a new Constitution by Illinois somehow had the effect of narrowing the scope of the 14th Amendment to the United States Constitution. Furthermore, these Petitioners persist in advancing in this Court a frivolous argument with regard to the construction of Article IX-A, — an argument which was decisively rejected by the Illinois Supreme Court and which involves no conceivable federal question.³

The Cook County defendants have as yet filed no response to Lake Shore's Jurisdictional Statement, and have not replied to the *Maynard* Motion to Strike.

(5). The final group of litigants consists of the "plaintiffs" in *Shapiro v. Barrett*, namely, Clemens K. Shapiro, Jerome Herman, d/b/a The Spot, Guy S. Ross and Eugene D. Ross, d/b/a Guy S. Ross & Co., a partnership, and M. Weil and Sons, Inc., an Illinois corporation. None of these parties has sought review in this Court, nor have any of them filed responses to Lake Shore's Jurisdictional Statement or to either of the Petitions for Certiorari.

II.

With respect to the Petition for Certiorari filed by the Attorney General (No. 71-685), it is Lake Shore's position that the federal constitutional issue therein raised is undoubtedly a substantial one, — but one, nevertheless, that has been well settled by prior decisions of this and

³ The reference is to the argument that Article IX-A should be construed so as to prohibit only the taxation of *non-business* personal property. Such an interpretation would avoid the constitutional difficulty inasmuch as the classification would be based on the nature or use of the property itself, rather than upon the character of the owner.

other courts. This Court, therefore, should deny certiorari. The controlling authorities are lucidly and succinctly discussed at pages 8 through 15 of the Consolidated Motion to Strike and Brief in Opposition filed by the *Maynard* plaintiffs.

A decent respect for the realities of the situation nonetheless compels Lake Shore to recognize that this Court may be reluctant to note probable jurisdiction in Lake Shore's appeal while at the same time denying the writ of certiorari being sought by prominent public officials, — including the Governor of Illinois in the form of a brief *amicus curiae*. If that is so, then Lake Shore would be well enough satisfied if this Court should see fit to grant the Petition in No. 71-685, while at the same time noting probable jurisdiction of Lake Shore's appeal.

The substantial federal question raised by the Petition in No. 71-685 perhaps ought to be re-examined and discussed in the light of changing conditions and newly emerging concepts of equal protection of the laws. Lake Shore remains confident that this Court, after hearing full argument, will reaffirm its prior holdings on the issue and vindicate the soundness of the seminal analyses by Justices Field and Sawyer in the *California Railroad Tax* cases.⁴

The third possibility, of course, is that this Court will grant either or both of the Petitions for Certiorari while at the same time declining to hear Lake Shore's appeal. In that event, for reasons already noted in Lake Shore's Jurisdictional Statement (pages 13-14), Lake Shore will

⁴ *San Mateo County v. Southern Pacific R. Co.*, 13 Fed. 722 (1882), app. dism. 116 U.S. 138; and *Santa Clara County v. Southern Pacific R. Co.*, 18 Fed. 385 (1883), aff'd. on other grnds., 118 U.S. 394.

in all likelihood ask leave of Court to withdraw its appearance in both certiorari proceedings and permit the cause to be heard *ex parte*.

III.

As to the Petition for Certiorari filed in the *Shapiro* case by the Cook County taxing officials (No. 71-691), Lake Shore respectfully urges this Court to deny certiorari. Each of the Petitioners in that case is also a party to the *Lake Shore* case and will have adequate opportunity to present his views in the event that this Court notes probable jurisdiction in No. 71-674 and/or grants the writ in No. 71-685. Permitting a separate review of the *Shapiro* case can serve no useful purpose, and will tend only to obfuscate the real issues.

Furthermore, it is readily apparent from the record, and particularly from the complaint filed therein and the order of the trial court (reproduced at p. A 33 of the Amended Petition for Certiorari in No. 71-685), that *Shapiro v. Barrett* does not constitute a "case" or "controversy" within the meaning of Article III, Section 2 of the Constitution of the United States: *Chicago & G. T. Ry. Co. v. Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 402 (1892); *Liverpool, New York & Philadelphia Steam-Ship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355 (1885); *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703 (1962); *United States v. Fruehauf*, 365 U.S. 146, 157, 81 S.Ct. 547, 554 (1961), reh. den. 365 U.S. 875, 81 S.Ct. 899 (1961); Cf. *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952 (1968); *Jenkins v. McKeithen*, 395 U.S. 411, 423, 89 S.Ct. 1843, 1849 (1969), reh. den. 396 U.S. 869, 90 S.Ct. 35 (1969); *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151, 90 S.Ct. 827, 829 (1970).

CONCLUSION

For the foregoing reasons Lake Shore Auto Parts Co., appellant in No. 71-674, and Respondent in Nos. 71-685 and 71-691, respectfully requests that this Court deny the Petitions for Certiorari in Nos. 71-685 and 71-691, while at the same time noting probable jurisdiction in No. 71-674. In the alternative, Lake Shore requests that the Court grant Certiorari in No. 71-685 and also note probable jurisdiction in No. 71-674.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NOVEMBER TERM, A.D. 1971

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

**CONSOLIDATED MOTIONS TO STRIKE
AND BRIEFS IN OPPOSITION OF
EDWARD J. BARRETT, ET AL.,
(PETITIONERS IN CASE NO. 71-691)
IN CASES NOS. 71-674 AND 71-685**

I.

MOTION OF EDWARD J. BARRETT, ET AL., PETITIONERS IN CASE NO. 71-691, TO STRIKE AND DISMISS THE APPEAL AND THEIR BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED BY LAKE SHORE AUTO PARTS CO. IN CASE NO. 71-674.

Petitioners here were defendants-appellants in the Supreme Court of Illinois in the case of *Lake Shore Auto Parts Co. v. Bernard J. Korzen, et al.*, that Court's Docket No. 44199.

These petitioners, in their original brief, urged the Illinois Supreme Court as follows:

"ARGUMENT**I.**

"THE COURT ERRED IN HOLDING THAT ARTICLE IX-A "AMENDED" THE REVENUE ACT OF 1939, AND THAT AS A RESULT OF SUCH "AMENDMENT," THAT ACT, "AS SO AMENDED," VIOLATED THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, BECAUSE IT THEN DENIED TO PLAINTIFF THE EQUAL PROTECTION OF THE LAW THEREIN GUARANTEED.

"Plaintiff does not assail or challenge the validity or constitutionality of Article IX-A. Indeed, plaintiff declares, in its brief in support of its motion for summary judgment, that it "most emphatically does not seek to have Article IX-A declared unconstitutional in any respect whatsoever." (Pl. Br., p. 1).

The entire cause of action upon which plaintiff predicates its complaint, is the charge that "It is only the existing revenue statute, as that statute is amended by Article IX-A, which plaintiff claims to be a violation of the equal protection clause of the Federal Constitution . . ." (Emphasis supplied.) (Pl. Br., p. 3), because that statute as so amended results in the arbitrary and unreasonable "exemption" of "individuals" while "retaining" the personal property tax on plaintiff.

Plaintiff cites not one authority for the premise advanced by it, and accepted by the court, that Constitutions, be they Federal or State, 'amend' statutes which are in variance with, or conflict with provisions of those Constitutions.

The reason for such absence of authority seems clear. There are none.

To the contrary, the Constitution itself establishes the exclusive manner by which statutes are permitted to be "amended" in this State. Article IV, Section 12, and Section 13, declares with specificity, the manner in which bills may be altered or amended, and the procedure required to accomplish such alteration or amendment.

Sections 12 and 13 of Article IV are set out in their entirety in the Appendix attached hereto. Statutes in the State of Illinois, by constitutional fiat, can only be amended by the enactment of amendatory statutes.

Article IX-A neither disturbs nor effects the exclusive direction of Sections 12 and 13 of Article IV. The court below overlooked this most significant fact. The decision of the court below necessarily, albeit tacitly, ignores the direct declaration of Article IV, that, in Illinois, statutes are amended in the manner and by the method established in that Article, and in no other way. The court committed serious and fatal error by such oversight. The court should so hold.

Further, plaintiff itself, although urging the premise that constitutional provisions "amend" statutes, submits as authority for that proposition, cases which declare that "The rule is well established that an existing statute which is in conflict with a newly adopted constitutional provision is rendered void and unenforceable, precisely as would be the case with a newly enacted law in conflict with a pre-existing constitutional requirement". (Pl. Br., p. 3).

The difference between a Constitution "amending" a statute and "rendering void" a statute is not a distinction predicated upon mere exiguous metaphysics. The difference is significant and decisive here, and its discernment demon-

states, without more, the error founding the judgment below.

Defendants are in complete accord with plaintiff that the rule is well established that a statute, in conflict with a constitutional provision is, as a result of such conflict, thereby rendered void and unenforceable. That well established rule is the very crux of this case, and destructive of plaintiff's entire cause of action.

There is no question but that a constitution, or any provision thereof, simply does not "amend" a statute or any provision of that statute.

The Constitution of the State of Illinois is the supreme law of this State. *People v. Hotz*, (1927) 327 Ill. 433. That being so, all acts of the citizens of the State of Illinois, all statutes passed by the General Assembly of this State, and all statutes passed by the General Assembly of this State, and all judicial determinations are scrutinized in the light of the Constitution of this State. All of such conduct, acts, or determinations are either permitted by, authorized by, or are offensive to or prohibited by the Constitution. All are either constitutional or unconstitutional.

This court in *Fiorito v. Jones*, 39 Ill. 2d 531, held unconstitutional the 1967 amendments to the Service Occupation Tax and related Tax Acts. Prior to those amendments, the Service Occupation Tax Act imposed a tax upon "all persons engaged in the business of making sales of service. . . ." The 1967 amendments limited the application of the service occupational taxes to "sales of service" by only four specifically enumerated categories of servicemen. In that case, the court said, ". . . It is apparent that the basic question determinative of all the constitutional objections advanced here is whether a reasonable difference exists between the four sub-classes specifically

subjected to taxation by the amended Service Occupation and Service Use Tax Acts and those sub-classes impliedly and expressly exempt from taxation.” (p. 536). This court held the 1967 amendments to be unconstitutional in their entirety, thereby rendering void, as well, the repealing sections contained in those amendatory acts.

This court made it clear by such declaration that if statutes or provisions in statutes conflict with the Constitution of this State, the result of such contrariness renders those statutes, or the provisions assailed in those statutes, void ab initio.

Again, and just recently, this court had occasion to iterate this well established law. In *Van Driel Drug Stores, Inc. v. Mahin*, 265 N.E. 2d 659 (Sept. 1970), this court said:

“While it is true that when House Bill 2482 was adopted subsequent to House Bill 257, the former appeared to have repealed the latter by implication, the question remains as to what effect declaring House Bill 2482 unconstitutional has on House Bill 257. In *People ex rel. Barrett v. Sbarbaro*, 386 Ill. 581, 590, the court stated: ‘An invalid law is no law at all. It confers no rights and imposes no duties. [Citation.] The effect of the enactment of an invalid amendment to a statute is to leave the law in force as it existed prior to the adoption of such amendment.’ In *People v. Schraeberg*, 347 Ill. 392, the court found that an unconstitutional law ‘confers no right, imposes no duty and affords no protection. It is in legal contemplation as though no such law had ever been passed. [Citation.]’ When House Bill 2482 was declared unconstitutional in *Fiorito*, it was void ab initio. (See *Quitman v. Chicago Transit Authority*, 348 Ill. App. 481.) It was at that point wholly inoperative as though it had never been passed, and therefore could not repeal House Bill 257.” (p. 661)

In applying these principles to the instant case, it is apparent that the effect of Article IX-A, which prohibits the taxation of personal property by valuation as to individuals, is to make imposition of such tax unconstitutional in Illinois.

Therefore, any statute, or any provision or portion of any statute in existence in the State of Illinois on that date, which purports to, or attempts to impose such tax is unconstitutional. That being so, any provision of any statute which imposes such tax is void, ab initio, and is considered in legal contemplation as though it never had been in existence.

Emergent then is the perception that the Revenue Act of 1939 is not "amended" so as to "exempt" individuals from the imposition of personal property tax. The Illinois Revenue Act of 1939, as a result of Article IX-A, is considered in law not to impose such tax on "individuals" because "individuals" do not appear there as subjects upon whose personal property that tax is imposed. Conversely apparent from the above authority, the Revenue Act of 1939, as a result of Article IX-A, imposes the tax provided in that Act only on the personal property of persons other than "individuals."

It can be no other way. Individuals cannot be included within the circumference of that act because Article IX-A declares such tax on the personal property of "individuals" to be unconstitutional in Illinois. That being so, it, of course, becomes eminently apparent that the General Assembly of this State could not enact an amendment to the Revenue Act of 1939 to include "individuals" within the imposition of that tax because Article IX-A makes it unconstitutional to impose such tax; neither can plaintiff include individuals in that act, and neither can the court

below, because the imposition of such tax is prohibited and any attempt to do so by enactment or by judicial declaration would be void.

The Revenue Act of 1939, subsequent to January 1, 1971, imposes that tax, and provides for its imposition only upon all non-individuals, be they corporate or non-corporate entities.

As demonstrated above, the effect of such prohibition in Article IX-A being to deny the very existence of any language whatsoever purporting to impose such tax, therefore, there is not one word in the entire length and breadth of the Revenue Act of 1939, which indicates or implies the application of that act to "individuals."

The conclusion necessarily emerging from these observations, is that there simply is no Revenue Act of 1939, "as amended", in existence at all, let alone capable of offending anything because of such "amendment."

Article IX-A has removed individuals and their personal property from imposition of the tax in the Revenue Act by erasing from that Act all reference to "individuals." In legal contemplation that Act is required to be read as if "individuals" and all reference thereto, is without existence there. This is the effect of Article IX-A which declares the imposition of such tax by that Act unconstitutional, and prohibits the inclusion in that Act of individuals for purposes of the tax there imposed.

Defendants respectfully submit that the foregoing amply demonstrates that no discrimination against plaintiff, or invalid or unreasonable classification between plaintiff and "individuals," is capable of emergence from the Revenue Act of 1939 because that act applies solely and exclusively to persons other than "individuals." That Act does not contain any class such as "individuals." A fortiori, it is

impossible for that Act "to be amended" so as to "exempt" individuals "while retaining" that tax on persons other than "individuals." The court erred in holding to the contrary. That error compels this court's order of reversal.

II.

THERE BEING NO REVENUE ACT "AS AMENDED" BY ARTICLE IX-A, PLAINTIFF'S ACTION PREDICATED ENTIRELY ON SUCH EXISTENCE FAILS, AND THE COURT ERRED IN NOT SO HOLDING.

Plaintiff's entire cause of action is predicated upon the existence of "an amended" Revenue Act of 1939. The trial court not only accepted plaintiff's premise but so found and so held. There is no Revenue Act of 1939 "as so amended". A fortiori plaintiff's case predicated upon such premise fails. The cause of action upon which plaintiff predicated its case is nonexistent. Nonexistence of a cause of action denies the existence of grounds for relief predicated thereupon.

Plaintiff's cause of action is asserted by plaintiff, and held by the court, to arise solely from, and is predicated exclusively on the ground that the Revenue Act of 1939 "as amended" by Article IX-A to "exempt" individuals from the class upon which that Act imposes that tax, by such amendment occasions the discrimination against plaintiff upon whom that Act continues to "retain" that tax.

The fallacy in that syllogism, apparent from the exposition heretofore, is fatal to plaintiff and the judgment of the court. The major premise engendering the erroneous conclusion reached by the court is denied by the law. There is no Revenue Act of 1939 as amended. There is no ground upon which plaintiff's action finds support. Plaintiff pre-

sents no cause of action cognizable under the law to permit its entertainment by the court. The relief plaintiff seeks is the declaration by the court that judgment be entered in favor of plaintiff. The very statute, pursuant to which plaintiff instituted its action, demands as a condition of its invocation that a "cause" of action exist which affords grounds to support that action, thereby providing the basis necessary before the court's declaration can be enlisted. (Declaratory judgment act, ch. 110, section 57.1, Ill. Rev. Stat. 1969).

The court erred in adopting plaintiff's premise that the law permits recognition of the principle, advanced by the plaintiff, that statutes, declared by constitutional provisions to be prohibited, are thereupon considered under the law to "be amended" by such constitutional prohibition. Whereupon the court further erred in considering that the construction of those statutes "as so amended" invokes application of those principles of law pertinent to conflicts or variances found to exist between statutes and subsequently enacted amendatory statutes.

The Revenue Act of 1939, not having been amended by Article IX-A, invokes none of the principles pertinent to consideration of questions arising between statutes and amendatory statutes. The court erred in not so holding. The court erred in the application of those principles to the instant matter.

Plaintiff denies its cause of action is founded in law on the ground that Article IX-A is offensive to Illinois Constitution, and plaintiff denies its cause of action is founded on any offensiveness of Illinois Constitution, as amended by Article IX-A, to the Constitution of the United States.

Plaintiff predicates its entire cause of action, and sought and obtained the court's declaration that plaintiff was en-

titled to relief predicted on a cause of action which requires for its existence the concept that the Revenue Act of 1939, as amended by Article IX-A, offends the Constitution of the United States.

Defendants respectfully submit the non-existence of that cause of action. The court committed palpably reversible error in finding such cause of action existed and upon the existence of which plaintiff was entitled to relief. This court should so hold." (Brief of defendants-appellants, pp. 7-15)

These petitioners, again, in their reply Brief, addressed the attention of the Illinois Supreme Court to the following facts and made the following arguments:

"II.

"LAKE SHORE PLAINTIFF RESPONDING AS APPELLEE TO THE BRIEF OF THESE DEFENDANT-APPELLANTS IN THIS CASE, FAILS TO RESPOND TO THE CHARGE BY THESE DEFENDANTS-APPELLANTS THAT LAKE SHORE PLAINTIFF'S COMPLAINT IS FATALLY DEFECTIVE FOR LACK OF THE ESTABLISHMENT OF A LEGALLY COGNIZABLE CAUSE OF ACTION AND THAT THE DECISION BY THE TRIAL COURT PREDICATED UPON THE VALIDITY OF SUCH CAUSE OF ACTION NECESSARILY MUST FALL. LAKE SHORE PLAINTIFF, IN THE ABSENCE OF DENIAL, IS PRESUMED TO ADMIT THIS CHARGE. THIS COURT IS COMPELLED TO ENTER ITS ORDER OF REVERSAL AND DISMISSAL.

Points I and II of the Argument in the brief of these defendants-appellants in their appeal from the order of the trial court in this case (Lake Shore Auto Parts Co.

v. Korzen, this court's No. 44199) demonstrate; and these defendants-appellants urge there at length, that the trial court committed grievous and reversible error for the reason that plaintiffs patently had failed to establish a cause of action and particularly a cause of action upon which the court could predicate grounds for, and upon the existence of which it could grant, the relief there sought. Which cause of action was found to exist by that court, and the propriety and validity of which was relied upon by that court to entitle plaintiffs to the relief granted by that court.

This court unvaryingly, without exception, and correctly, under the law, pursuant to the requirements of the law and the Rules of this Court, has insisted that issues raised by parties before it, require response by the parties effected by the presence of those issues, and that the absence of such response compels this court to presume that such position is well taken, and the decisiveness of such position is admitted by absence of its denial.

The admission by Lake Shore plaintiff here disposes of that case before this court. These plaintiffs respectfully request the entry by this court of its order finding the issue in favor of these defendants, reversing the order appeal from, and directing the dismissal of that case." (Reply brief, pp. 7-8)

These petitioners, for the foregoing reasons, urged the Supreme Court of Illinois to dismiss the complaint filed by Lake Shore for failure of that complaint to state a cause of action. The Supreme Court of Illinois did, indeed, reverse and remand Lake Shore with directions to the trial court to dismiss the complaint filed therein. (Op. Ill. Supr. Ct., last page).

It is exquisitely apparent that the judgment of the Supreme Court of Illinois in the Lake Shore case is based

upon an adequate and independent non-Federal ground. Such being true, the judgment of the Illinois Supreme Court in Lake Shore is non-reviewable by this Court.

These petitioners respectfully submit that the appearance of this fact in the Lake Shore case comes directly within the comprehension of, and needs no further demonstration other than this Court's pronouncement in *Herb v. Pitcairn*, 324 U.S. 117, 125-6. There this Court, rejecting review under such circumstances, stated:

" . . . "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion". *Herb v. Pitcairn*, 324 U.S. 117, 125-6.

So firm is this principle that, where a case has been accepted for review and an adequate state ground becomes apparent only after oral argument, the writ of certiorari will be dismissed as improvidently granted. *Wilson v. Loew's Inc.*, 355 U.S. 597.

For this reason alone, the alternative appeal and petition for certiorari filed by Lake Shore is improvident, and should be dismissed and denied.

But there is a further and independent reason why Lake Shore's alternative petition should be denied.

Nowhere in Lake Shore's jurisdictional statement, or in its petition for writ of certiorari, does Lake Shore object to, oppose or assign as error, the judgment of the Illinois Supreme Court dismissing the complaint filed by Lake Shore. Significantly, Lake Shore's ambivalent petition is totally absent any disagreement whatsoever with the judgment entered by the Illinois Supreme Court dismissing Lake Shore's complaint for the reason that no cause of action was found by the Illinois Supreme Court to emerge therefrom. This is fatally defective to Lake Shore's position before this Court.

Petitioners respectfully submit that either of the foregoing reasons, and certainly both, compel the entry by this Court of its order dismissing the appeal filed by Lake Shore and denying the writ of certiorari it seeks this Court to issue.

II.

MOTION OF EDWARD J. BARRETT, ET AL., TO STRIKE AND DISMISS THE CONSOLIDATED MOTION TO STRIKE AND BRIEF IN OPPOSITION TO CASES NOS. 71-674, 71-685, 71-691 OF RESPONDENTS, EUGENE L. MAYNARD, PROVISO TOWNSHIP HIGH SCHOOL DISTRICT NO. 209, BELLWOOD GRADE SCHOOL DISTRICT NO. 88, CICERO GRADE SCHOOL DISTRICT NO. 99, AND RIVER GROVE GRADE SCHOOL DISTRICT NO. 85½, ALL IN COOK COUNTY, ILLINOIS.

Maynard, Ill. Docket No. 44308, appeared before the Illinois Supreme Court upon leave granted by that court to file that suit in that court as an original action for declaratory judgment. These petitioners were respond-

ents-defendants there. The petitioners-plaintiffs in that case urged that Article IX-A discriminated unconstitutionally against corporations and prayed for the reimposition of the personal property tax on individuals as that tax was so imposed prior to its removal by the People of the State of Illinois in the Referendum held November 3, 1970, in which referendum the overwhelming majority of the voters of that State declared its prohibition.

These petitioners urged the Illinois Supreme Court to dismiss that complaint for want of capacity of those particular plaintiffs to maintain that action.

In that case, these petitioners contended to the Supreme Court of Illinois as follows:

"ARGUMENT

I.

"THE PLAINTIFFS ARE WITHOUT STANDING TO ASSAIL THE CONSTITUTIONALITY OF ARTICLE IXA OF THE ILLINOIS CONSTITUTION OF 1870.

"Plaintiffs, Proviso Township High School District No. 209, Bellwood Grade School District No. 88, Cicero Grade School District No. 99, and River Grove Grade School District No. 85½, are governmental bodies in the County of Cook, State of Illinois, and are not subject, in any way whatsoever, to the imposition of personal property tax under, or by virtue of, or as a consequence of the adoption of Article IXA, nor will they be, nor can they be, by any decision rendered by this Court. In fact, these plaintiffs, not only under Article IXA, but even prior to its adoption, were *never* subject to the imposition of personal property tax.

The plaintiff, Eugene L. Maynard, is a natural person, none of whose personal property is owned or used in the operation of a business, or for any business purpose, and all of which property is owned and used for his person enjoyment and that of his family.

As such, he is an "individual" within any conceivable meaning of that word as it appears in Article IXA of the Illinois Constitution of 1870. As such "individual" Mr. Maynard was relieved of the burden of personal property taxation by the adoption of Article IXA as were all other such individuals similarly situated.

There is not one party litigant in the cases consolidated by order of this Court (Lake Shore, Maynard, Shapiro) who urges, contends, or implies that plaintiff Maynard is subject to the tax prohibited by Article IXA. To the contrary, all parties litigant, independently of each other and in concert, admit, agree and concede that Article IXA prohibits and makes unconstitutional the imposition of that tax on plaintiff Maynard and all other members of his class.

Further, *neither* of the Cook County Circuit Courts, either in Lake Shore or in Shapiro, hold plaintiff Maynard and members of his class subject to that tax. To the contrary, both decisions by those courts hold that personal property owned by natural persons and used by them for their own personal use and enjoyment and that of their families is not subject to the imposition of personal property tax.

Neither the Cook County defendants nor the defendant the State of Illinois, in any of these proceedings, at any time, have ever alleged or contended that Article IXA or the effect of Article IXA, or any consequence ensuing from Article IXA, in any way subjects could or would subject, plaintiff Maynard and members of his class to the imposition of the tax prohibited by Article IXA.

No such issue is before this Court in any of the three cases now before it. No such issue appears in the cases (Lake Shore and Shapiro) on appeal to this Court.

No such issue appears in the instant original action filed by Maynard in this Court. No such issue appears here for the reason that neither these defendants, nor the State Department have imposed, are imposing, have sought to impose, seek to impose, or threaten to impose such a tax on plaintiff Maynard; nor on plaintiffs school districts.

INDEED, NOWHERE HERE DO ANY OF THESE PLAINTIFFS ALLEGE OR CONTENT THAT, EITHER AS A RESULT OF ARTICLE IXA OR BY ANY ACTION, PRESENT OR FUTURE, OF THESE DEFENDANTS HAS ANY INJURY TO THEM BEEN OR WILL BE OCCASIONED.

Plaintiffs' action filed as an original action in this Court is one for declaratory judgment. The Act governing those actions expressly requires the existence of "an actual controversy". The entertainment of such proceedings is discretionary with the Court. Illinois Revised Statutes, 1969, Chapter 110, section 57.1. Plaintiffs recognize the essentiality of the existence of an "Actual controversy to the viability of their cause of action".

Plaintiffs recognize this requisite in the following fashion:

"In the presence of an actual controversy, the plaintiffs say . . .

[Maynard Brief p. 2]

However, this constitutes the full extent of plaintiffs' contribution to the stature of the "actuality" and the "controversy" demanded. Nowhere, do the plaintiffs allege anything beyond this token recognition; or in demonstration of action or conduct, the

result of which has injured or will wrong these plaintiffs.

They have not, because indeed, they cannot. As demonstrated above, the plaintiffs enjoy complete immunity from imposition of personal property taxes; and these defendants and all parties to this litigation argue that they continue to enjoy this immunity and that this Court should so hold.

None of the plaintiffs in this action are subject to personal property tax, yet they assail the very provision which relieves one of them of the burden, asserting that the provision is "vague" and establishes "a system of class violative of the equal protection and the due process clauses of the United States Constitution". It is axiomatic that a party may not be heard to claim a constitutional protection unless he belongs to a class for whose sake the constitutional protection was given. *People ex rel. Hatch v. Reardon*, 204 U.S. 152, 160 (1907). The protection given is to those who must continue to pay a tax while others, similarly situated, are excused. Persons who have never paid a tax are without standing to assail a provision which relieves some persons of that tax burden; former taxpayers who have been relieved and attack the relieving provisions, lack gratitude and a rational concern for their own purse as well.

In summation, nowhere do these plaintiffs allege or charge that the defendants have assessed, are assessing, threaten to assess, or intend to assess personal property tax on the property owned by the plaintiffs. Nor, do they allege or charge that the plaintiffs threaten or intend to compel payment of any such tax. There is, therefore, no cause or controversy. The court should dismiss this complaint". (Brief of County Defendants, pages 4 through 7).

The Illinois Supreme Court dismissed the *Maynard* complaint. The order of that court, in full, is as follows:

"And now, on this day, the Court having diligently examined and inspected as well the complaint for declaratory judgment filed by petitioners and the pleas and the Motion by respondents to dismiss the complaint, and being fully advised of and concerning the premises, are of the opinion that the said complaint is not well taken.

THEREFORE, it is considered and ordered by the Court that the said complaint be and the same is hence dismissed".

Here, as well, Maynard *et al.* are without standing before this Court for the same reasons heretofore assigned by petitioners to apply to Lake Shore petitioner.

This fatal impediment seemingly appears to be understood by Maynard, *et al.* to negate a successful petition to this Court to issue its writ of certiorari to the Illinois Supreme Court from the judgment it entered against Maynard, *et al.* Indeed, Maynard, *et al.* has filed no petition for a writ of certiorari.

Misunderstood, however, by Maynard, *et al.*, is the fact that such foreclosure equally forecloses them from any access to this Court in any capacity whatsoever, particularly in the capacity in which they seek to impress themselves into the proceedings before this Court by way of the consolidated motion filed by them.

These petitioners respectfully submit that Maynard, *et al.* lack any capacity whatsoever before this Court in this proceeding. This Court should so hold.

III.

BRIEF OF EDWARD J. BARRETT, ET AL., IN OPPOSITION TO THE AMENDED PETITION FOR WRIT OF CERTIORARI FILED BY ROBERT J. LEHNHAUSEN IN CASE NO. 71-685.

Although, these petitioners, in their petition for writ of certiorari in *Barrett, et al. v. Shapiro, et al.*, Case No. 71-691, defined the posture of each of the three cases which were consolidated by the Illinois Supreme Court, and have demonstrated there (Pet. for certiorari, Pages 14-16) that of those three cases, only the *Shapiro* case (Illinois Docket No. 4432) was decided by the Illinois Supreme Court on the merits, while in each of the other two cases the Illinois Supreme Court dismissed each of the complaints in each of those cases for the reasons heretofore assigned, yet, the petition for the writ of certiorari filed by petitioner Lehnhausen is not addressed to the issuance by this Court of its writ of certiorari to review the judgment entered in the *Shapiro* case. This is eminently clear, not merely from the caption of the Lehnhausen petition but throughout the entire context of that petition.

This being true, Lehnhausen's petition for certiorari is subject to the same fatal defectiveness heretofore demonstrated to be true in Lake Shore's alternative petition and the Maynard consolidated motion.

Lehnhausen here, in truth, urges only that corporations should be subject to Illinois' personal property tax. This is exactly what Lehnhausen urged before the Illinois Supreme Court. The judgment of the Illinois Supreme Court from which Lehnhausen seeks this Court's review, does, without question, hold that corporations are

subject to Illinois' personal property tax. Petitioner Lehnhausen prevailed below. The relief he sought has been granted by the Court below. He has been accorded full relief.

This Court can accord petitioner Lehnhausen no further relief.

This is true for the reason that petitioner Lehnhausen takes no position pertaining to the comprehension or confinement of the term "individuals" as representative of either "all persons other than corporations" or only as to "certain persons other than corporations".

This emerges from Lehnhausen's amended petition for certiorari in which petitioner Lehnhausen asks this Court to determine for itself the extent of the definition of the term "individuals". In this regard petitioner Lehnhausen takes no position before this Court, as, indeed, he took no position before the Illinois Supreme Court, as to the scope or refinement of that term. Lehnhausen, on page 41 of his amended petition for writ of certiorari, attempts here, as he attempted below, to divest himself of the responsibility of advocacy due both this Court and the Supreme Court of Illinois. Petitioner Lehnhausen merely poses the problem to this Court and requests this Court to assume the full responsibility to construe and determine which of two "probables" this Court might deem appropriate. Petitioner Lehnhausen on page 41 of his petition for writ of certiorari requests he be accorded relief by this Court as follows:

"This petitioner respectfully submits that either the dissenting opinion of Justice Davis was correct, or that the decision of Judge Donovan in the *Shapiro* case was correct".

These petitioners respectfully submit that petitioner Lehnhausen misunderstands the jurisdiction of this

Court in such regard. The doubt and apprehension demonstrated by petitioner Lehnhausen as to which of these two "probables" is applicable here, is not soluble by this Court. Petitioner's uncertainty, at best, could only accord him the entry by this Court of its order of remandment to the Supreme Court of Illinois for that Court to make that determination. The relief Petitioner Lehnhausen seeks in this Court is not available to him.

These petitioners respectfully submit that their obligation to this Court and the advocacy commensurate with the stature of the procedural and substantive federal and non-federal issues inherent in cases of this nature, and particularly in this case, compel the foregoing observations.

These petitioners respectfully submit that this Court should decline the issuance of its writ of certiorari to petitioner Lehnhausen.

In this regard, and subject to the same observations pertaining to petitioner Lehnhausen, is the *amicus curiae* brief filed by Richard B. Ogilvie, Governor of the State of Illinois, *pro se*.

That brief requests the same relief sought by the petition for certiorari filed by petitioner Lehnhausen. That brief neither affords nor urges any definition of the term "individuals" helpful to this Court, pertinent to the issues before this Court; nor does it demonstrate entitlement to the relief it seeks.

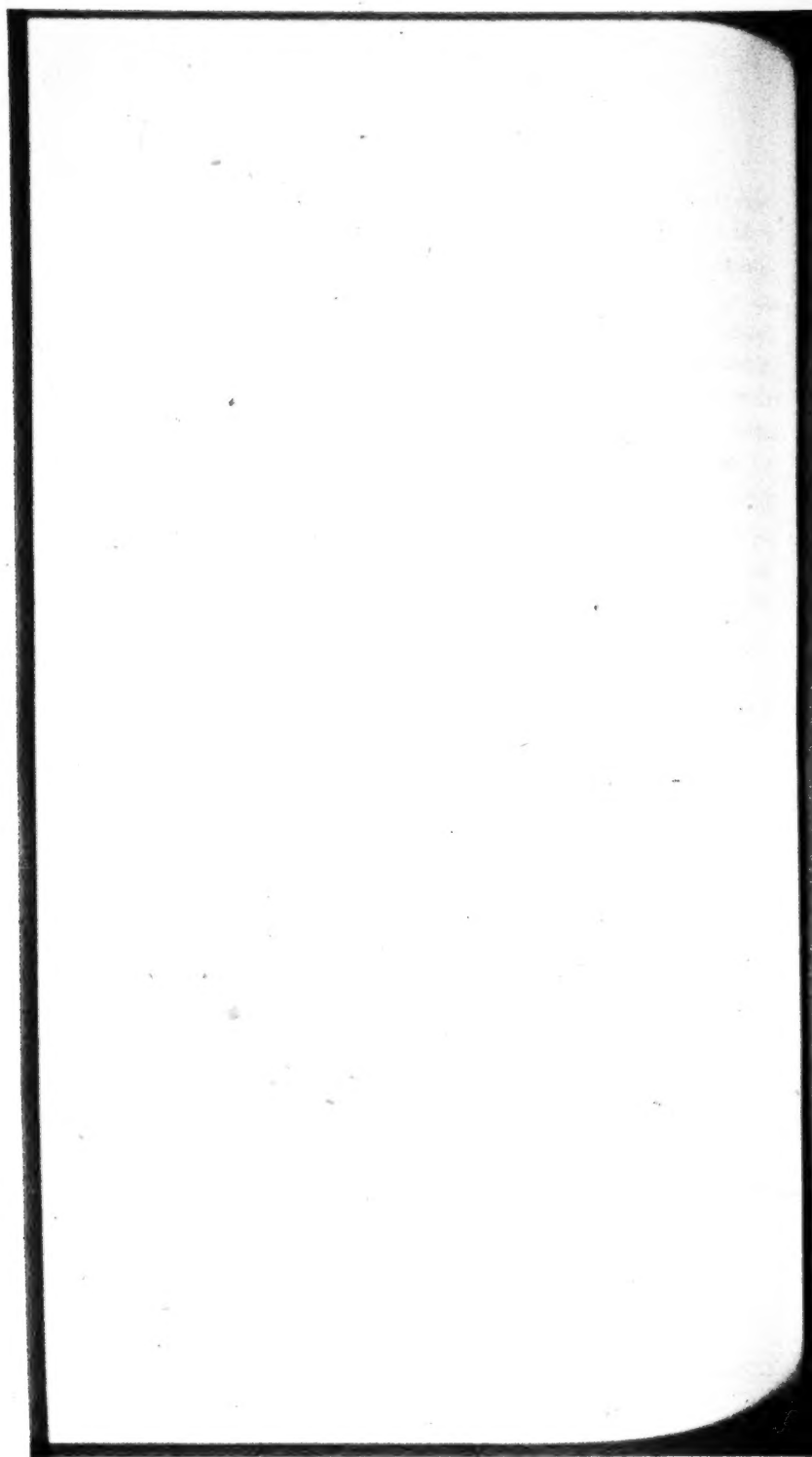
CONCLUSION

Petitioners respectfully submit that the foregoing reasons compel the entry by this Court of its orders dismissing Lake Shore's appeal and denying Lake Shore's petition for writ of certiorari, in Case No. 71-674; denying the amended petition for certiorari filed by petitioner Lehnhausen in Case No. 71-685; and dismissing the consolidated motion to strike and brief in opposition filed by Maynard, *et al.* in Cases Nos. 71-674, 71-685, and 71-691.

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ROBERT SEAVEN

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-874

LAKE SHORE AUTO PARTS CO., an Illinois Corporation, on its own behalf and also as representative of a class of corporations and other "non-individuals",

Appellant and Petitioner,

vs.

BERNARD J. KORZEN, County Treasurer and ex-officio County Collector of Cook County, GEORGE M. KEANE and HARRY H. SEMROW, Members of the Board of Appeals of Cook County, P. J. CULLERTON, County Assessor of Cook County, EDWARD J. BARRETT, County Clerk of Cook County, and ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois,

Appellees and Respondents.

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondent.

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County, Illinois, et al.,

Petitioners,

vs.

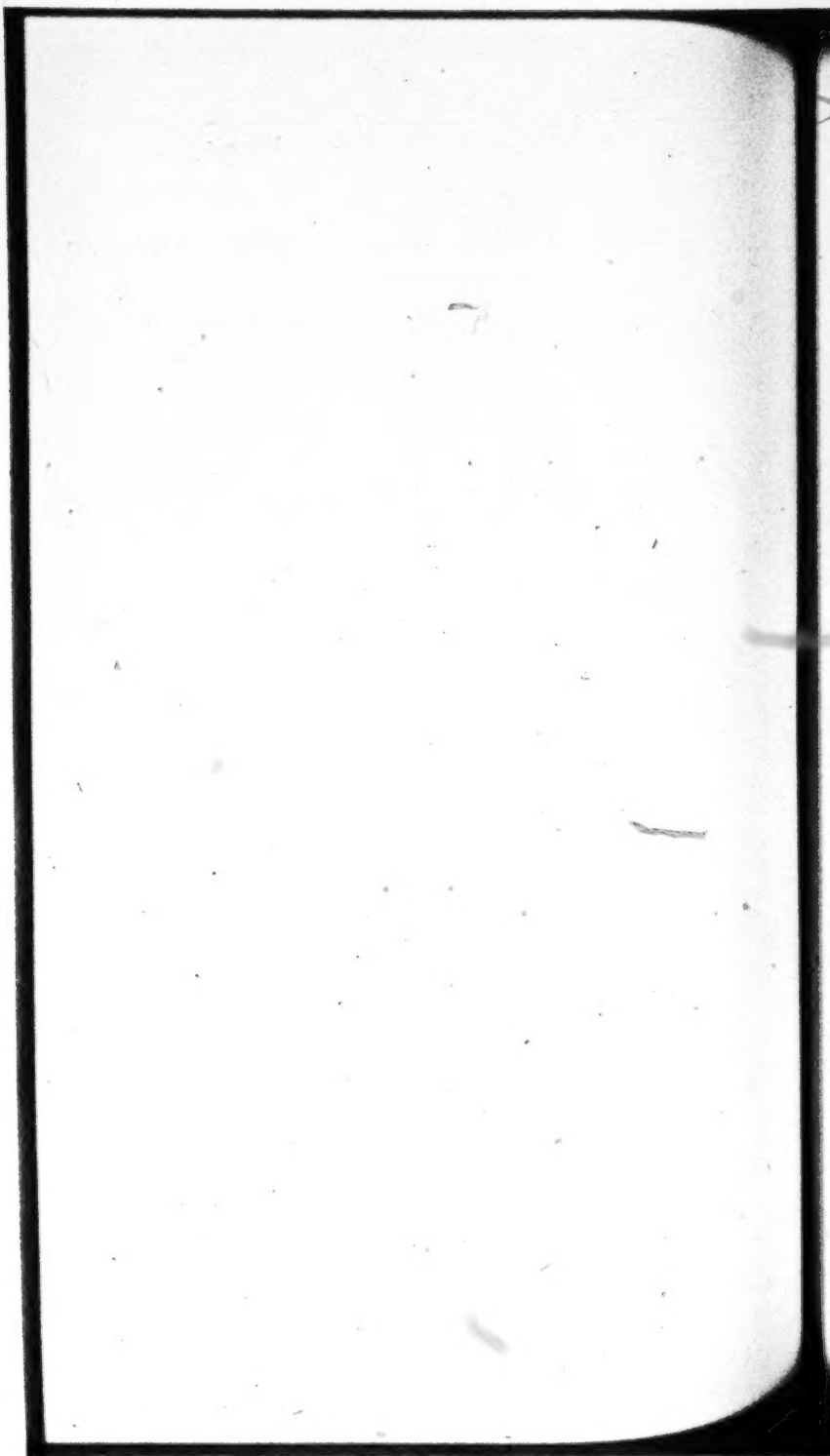
CLEMENS K. SHAPIRO, et al.,

Respondents.

**SUPPLEMENTARY BRIEF IN SUPPORT OF
CONSOLIDATED MOTION TO DISMISS AND
BRIEF IN OPPOSITION TO GRANT OF
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-674

LAKE SHORE AUTO PARTS CO., an Illinois Corporation, on its own behalf and also as representative of a class of corporations and other "non-individuals",

Appellant and Petitioner,

vs.

BERNARD J. KORZEN, County Treasurer and ex-officio County Collector of Cook County, GEORGE M. KEANE and HARRY H. SEMROW, Members of the Board of Appeals of Cook County, P. J. CULLERTON, County Assessor of Cook County, EDWARD J. BARRETT, County Clerk of Cook County, and ROBERT J. LEHNHAUSEN, Director, Department of Local Government Affairs of the State of Illinois,

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No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondent.

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County, Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

**SUPPLEMENTARY BRIEF IN SUPPORT OF
CONSOLIDATED MOTION TO DISMISS AND
BRIEF IN OPPOSITION TO GRANT OF
APPELLATE JURISDICTION**

INTRODUCTION

On February 4, 1972, Mr. Michael Rodak, Jr., Chief Deputy Clerk, requested at the Court's direction, additional

responses from the parties. Mr. Diamond, one of the attorneys for the Maynard respondents, sought information about that letter. He was informed by Mr. Rodak that the Court wished clarification of the role and interest of the parties. The Court also sought to know why only one response to the three petitions for certiorari had been filed. This additional brief is, therefore, filed by the only respondents (now of record) explaining their position and their view of the positions of the other parties. This brief is written upon the assumption that the reader has first examined respondents' previously filed "CONSOLIDATED MOTION TO STRIKE (sic) [DISMISS] AND BRIEF IN OPPOSITION TO CASES 71-674, 71-685, 71-691".

BRIEF

This case comes before the Supreme Court by way of three separate petitions for writs of certiorari, one of which is joined with a request for appellate jurisdiction. The judgment appealed from is a decision of the Illinois Supreme Court finding a constitutional exemption to the state personal property tax federally unconstitutional. The opinion was rendered in three cases consolidated for argument. All three cases sought a determination from the Illinois Supreme Court as to the constitutionality of Article IX-A of the 1870 Illinois Constitution. In each case the defendants were the same, being officials of Cook County and an official of the State of Illinois. Throughout all of the proceeding, using varied arguments, these governmental defendants have fulfilled their statutory obligation of defending the Illinois Constitution by contending that Article IX-A was constitutional under Federal standards. Since the Illinois Supreme Court found Article IX-A to be unconstitutional, it is clear why the government defendants seek to appeal.

The other request for this Court's assumption of jurisdiction comes from a plaintiff in one of the three consolidated cases (*Lake Shore Auto Parts Co. v. Lehnhausen et al.*, 71-685). Lake Shore Auto Parts Co., as was pointed out in Argument III of our previous brief, structured its argument upon the validity of Article IX-A and the invalidity of a section of the Illinois Revenue Act. When the Illinois Supreme Court ruled Article IX-A unconstitutional, it destroyed Lake Shore's substantial victory at the trial court level. Lehnhausen, the Director of the Department of Local

Government Affairs, although a defendant in all three consolidated cases, chose to file his petition for a writ of certiorari in the *Lake Shore* case. Thus two of the three petitions for writs of certiorari arise out of *Lake Shore*.

The County officials were also defendants in the *Lake Shore* case but they chose to file their petition for a writ of certiorari not in *Lake Shore* but in the *Shapiro* case (*Barrett, et al. v. Shapiro, et al.*, 71-691). The *Shapiro* plaintiffs have not, to date, filed a response to the petitions for writs of certiorari. We are, however, informed by one of the attorneys for the *Shapiro* plaintiffs that they will indicate to the Court that they do not oppose certiorari. It is, therefore, necessary that the Court be made aware that the acquiescence of the *Shapiro* plaintiffs does not indicate a thirst for knowledge but only a lack of adverse interest to the positions of those who petition for certiorari.

This series of cases commenced when the trial court judge in *Lake Shore* ruled that the effect of the exemption of individuals from personal property taxes was to abolish the tax for all taxpayers. This decision would have resulted in an immediate loss to taxing bodies throughout the state of \$250,000,000.00 per year. The only plaintiff in the *Lake Shore* case was a corporation. The interests of natural persons and other tax paying and receiving entities were not represented. Observers of that decision feared that the Illinois Supreme Court would receive the *Lake Shore* case in a flawed condition without all parties and issues properly before it.

It was felt that to present the Illinois Supreme Court with a case which did not present all issues and parties

would be to unnecessarily leave in doubt the proper interpretation of an important local revenue source.¹

Therefore, a number of attorneys through their clients sought to bring before the Illinois Supreme Court cases which would allow a decision dispositive of the entire matter. Some of the clients had truly adverse interests while others were brought into the cases simply to represent an interest not present in the *Lake Shore* or *Maynard* cases.

For example, four of the plaintiffs in the *Shapiro* case previously sought to enter the Illinois Supreme Court by

¹ The argument put forward by the *Maynard* petitioners in their request for original jurisdiction in the Illinois Supreme Court shows the concern felt by Illinois citizens and taxing bodies:

"Petitioners urge this Court to grant them leave to file a Complaint for Declaratory Judgment and Other Relief as an original action involving revenue. That action, which will present only questions of law, can be consolidated with any other similar matters now before the court whether by original or appellate jurisdiction for the purposes of expedited briefing schedule and for hearing.

"Such consolidated cases will cure the defect of the lack of all necessary and desirable parties in any case now before the Court and will offer to the Court parties who will present all arguments and allow for an opinion in sufficient time to avoid fiscal disruption throughout Illinois.

"Wherefore, petitioners respectfully pray that they be granted leave to file their Complaint for Declaratory Judgment in this Court, that their case be consolidated with any other pertinent cases now before the Court and that all cases be submitted to the Court under an expedited briefing and hearing schedule."

The Illinois Supreme Court granted the *Maynard* parties' petition and consolidated their case with *Lake Shore* and later with *Shapiro*.

way of its original jurisdictional power. Their petition captioned *Kuba v. Barrett* was denied. In the interim, the *Maynard* plaintiffs were successful in bringing an original action in the Illinois Supreme Court. The Illinois Supreme Court thus had before it on appeal one case brought by a corporation (*Lake Shore*) and one case of first impression brought by a natural person and various taxing bodies (*Maynard*). The *Kuba* petitioners having been denied the right to file directly in the Illinois Supreme Court amended their petition by substituting Clemens K. Shapiro for Edward A. Kuba, Sr., adding two attorneys and dropping one from the original list of five, and filed their case in the Circuit Court of Cook County. After a whirlwind decision in Circuit Court, that case (containing plaintiffs who were representative of natural persons, partnerships and corporations) reached the Illinois Supreme Court where it was consolidated, heard and decided along with the *Lake Shore* and *Maynard* cases.

Unlike the County officer and State officer defendants, the Shapiro parties did not file a petition for rehearing in the Illinois Supreme Court. Nor did any of the *Shapiro* parties file either a timely petition for certiorari or a response to those which were filed. If the *Shapiro* parties should enter the case at this point and urge certiorari be granted, their position unless fully explained should be given little weight by the Court.

Thus, there were basically five parties in the consolidated cases heard by the Illinois Supreme Court. Three of these parties (*Lake Shore*, County Defendants, State defendant) have asked the Court to grant certiorari with a goal of having Article IX-A declared constitutional. The fourth party, the *Shapiro* plaintiffs, have not yet appeared and if they appear their interests will not be adverse to the parties seeking certiorari. The *Maynard* brief in the Illi-

nois Supreme Court was the only brief which argued that an improper classification had been created in the Illinois Constitution when "individuals" were the sole class relieved of ad valorem personal property taxation. Of the five parties who argued below, only the tax levying bodies and natural person joined together as the Maynard respondents have a real interest in supporting the decision of the Illinois Supreme Court. There is no party to this case other than the Maynard respondents who have or will present arguments to the Court in opposition to the granting of writs of certiorari or appellate relief. The inquiry of Mr. Rodak can be answered as follows:

1. All real parties at interest are now before the Court and have filed adversary briefs seeking or opposing Supreme Court review.
2. The Maynard parties are the only true respondents in this case and their previously filed brief treats with their opposition to all three petitions filed.
3. Since the arguments put forward by the Maynard parties were adopted by the Illinois Supreme Court, their briefs before this Court will adequately serve as support for that decision to stand with no need for further review.

In light of the three points set out above, it might be wondered by the Court why additional briefs were necessary in order to explain the status of the parties. Mr. Rodak is correct in stating that without further explanation the case as it comes to the Court is somewhat confusing. The confusion has been caused by the unexplained failure of the *Shapiro* plaintiffs—at least nominally respondents—to file and by the form of the order used to dispose of the three cases by the Illinois Supreme Court.

Since the Illinois Supreme Court ordered its decision implemented by the trial judges in *Lake Shore* and *Shapiro*, there was no need for an order to be entered in *Maynard*

and that original action was dismissed. Because of the form of the Supreme Court's mandate, the petitioners have filed their requests for Federal review in cases other than the *Maynard* case and have hardly mentioned its existence in their petitions. Some of the parties and amicus have sent the Maynard respondents briefs and notices "as a matter of courtesy". The Governor of Illinois, for example, did not seek our consent—though it would have been granted—to file his pro se brief. The Maynard respondents do not intend nor do the Supreme Court rules contemplate that petitions to review state Supreme Court decisions should be considered in the absence of the arguments of parties whose position prevailed below. Section 4 of Supreme Court Rule 21 is as follows:

"All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this court, unless the petitioner shall notify the clerk of this court in writing of his belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the clerk, with service on the other parties, that he has an interest in the petition. All parties other than the petitioner shall be respondents, but respondents who support the position of the petitioner shall meet the time schedule for filing papers which is provided for the petitioner, except that any response by such respondents to the petition shall be filed as promptly as possible after receipt of the petition."

Eugene Maynard and the four school districts who joined with him in the case consolidated with *Lake Shore* and *Shapiro* in the Illinois Supreme Court are certainly "parties to the proceeding in the court whose judgment is sought to be reviewed". As such, they are entitled to participate

in the arguments before this Court in the absence of an admission of non-interest. No petitioner has, of course, claimed that the Maynard respondents are not interested. In fact, they are the only parties with a real interest and standing to argue that the Illinois Supreme Court was so clearly right that further appeal, being a matter of discretion, should be denied.

Since the filing of our "Motion To Dismiss" the Court has accepted a pro se brief from the Governor of the State of Illinois. That brief is an excellent apologia and deserves at least a short answer.

1. In the Governor's statement of facts (p. 3), he contends that the new Illinois Constitution was written in contemplation that Article IX-A would pass. The implication is made that if Article IX-A and its exemption for the vague class of "individuals" is ruled invalid that the phasing out of personal property taxes between now and 1979 would be impaired. Our initial brief in this Court makes clear at pages 22 to 27 that the drafters of the 1970 Illinois Constitution meant only to accommodate Article IX-A in the new document if it stood a judicial test. If IX-A is ruled unconstitutional, the new Constitution provides a manner by which the legislature by general law may make reasonable classifications and exemptions as a procedure to phase out the tax prior to 1979. The state legislature need only pass a statutory exemption which through clarity of language and reasonableness of classification would escape the defects of Article IX-A. Such relief for the taxpayers of the State of Illinois is available in Springfield and need not be sought in Washington.

2. The Governor makes it quite clear in his brief that he seeks a flat reversal of this Court's decision in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928). In spite of some random cases to the contrary

—all of which the Governor cites—*Quaker City* and its predecessor cases have been the law of the United States for 90 years. The general rule enunciated by those cases is as follows:

It is a denial of equal protection for the state to impose a property tax upon a corporate owner while exempting the identical property owned by an individual. From pages 8 to 15 of our earlier brief, we set out at length the cases both state and Federal which support that proposition. It would be most bizarre for all corporations in this country to be deprived of a historic equal protection right in a case where their interests were represented by a small auto parts firm. As was said at page 17 of our principal brief:

“Any attempt to strip corporations of the constitutional protections emanating from the *Quaker City Cab* case must be made in the face of the practical results of such a decision. Courts have agreed that corporations can be compelled to pay franchise taxes and higher rate income taxes for engaging in the same businesses as non-corporate entities. Corporations have, however, for 90 years, been free of arbitrary classification in ad valorem taxation. Corporate decisions and state taxation systems and policies have been made upon this firm and basic assumption of constitutional law. To upset such law would be to make corporations non-persons for the purposes of the United States Constitution and effectively end the equal protection guarantee in the field of corporate taxation. Such a startling change of American law should hardly be the end result of one small piece of bad draftsmanship by the Illinois General Assembly.”

3. Finally, Governor Ogilvie argues that discrimination in property taxation between natural persons and corporations can be justified if a rational basis can be

found for the distinction. In our principal brief we said as follows:

"In the present case the only motivation which has been or could be suggested for the passage of Article IX-A is that the corporate taxpayer is a lucrative and easy target for taxation. The language previously quoted from Mr. Justice Schaefer's opinion is the best proof that the Illinois Supreme Court sought but was unable to find any legitimate policy motive underlying the admitted discrimination:

'It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set.'"

(p. 16)

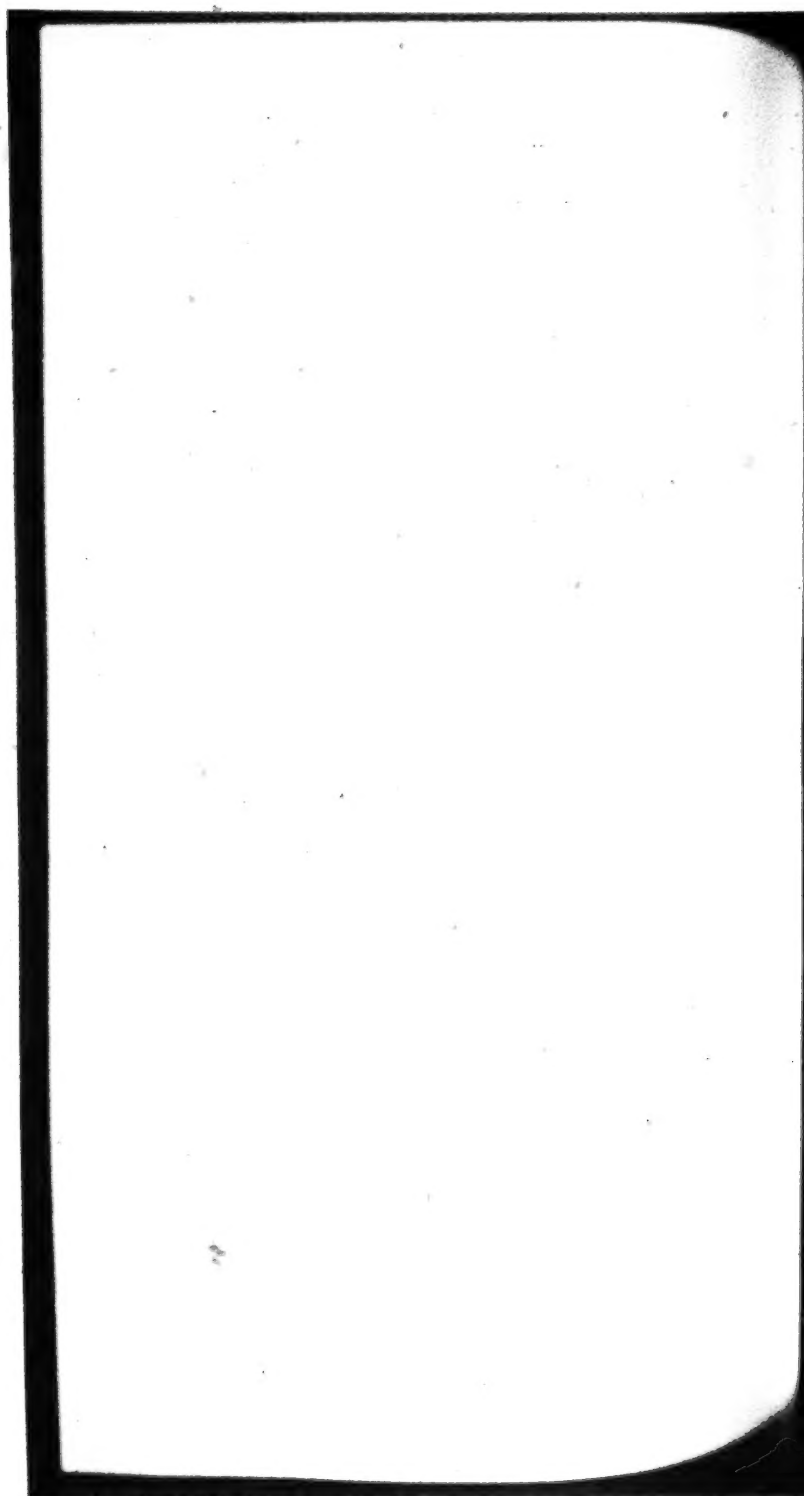
Governor Ogilvie nowhere in his amicus brief suggests any other rational basis for the discrimination. While the Governor's argument might be politically popular, it does not merit acceptance by this Honorable Court.

Respectfully submitted,

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FILE COPY

IN THE

Supreme Court of the United States

No. 71-685

Supreme Court, U.
FILED

MAY 22 1972

MICHAEL RODA, JR.

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF OF THE PETITIONER

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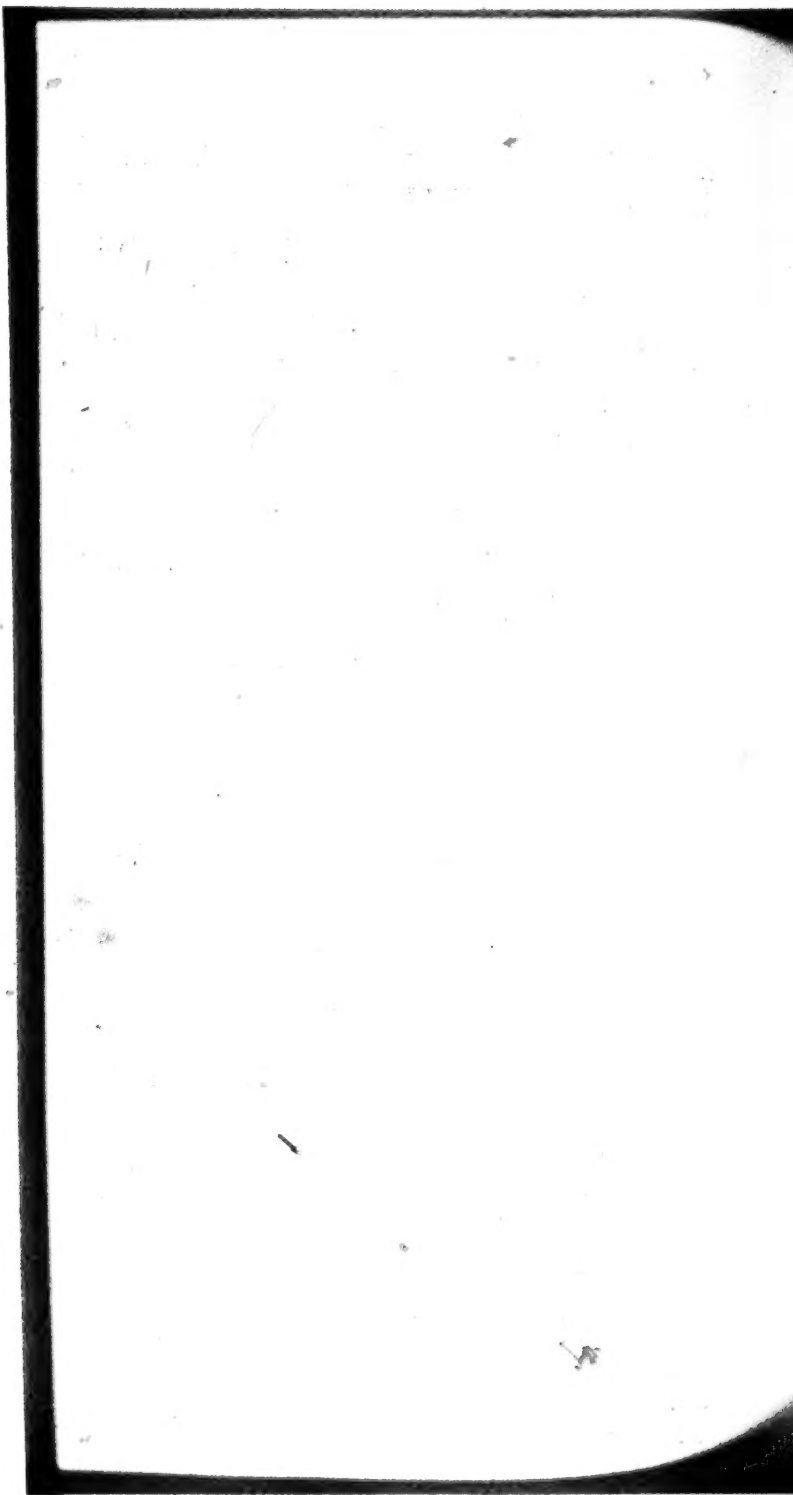
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondents.

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS**

BRIEF OF THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 49 Ill. 2d 137, 273 N.E. 2d 592 (1971).

JURISDICTION

The jurisdiction of this Court is invoked to review a final judgment of the Supreme Court of Illinois pursu-

ant to Title 28 U.S.C. § 1257(3). The decision of the court below was rendered on July 9, 1971. A petition for rehearing was denied on August 24, 1971. The petition for writ of certiorari was filed November 19, 1971, and granted April 3, 1972.

CONSTITUTIONAL PROVISION

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED FOR REVIEW

Whether a state constitutional provision which distinguishes between corporations and natural persons for the purpose of imposing an *ad valorem* tax on personal property violates the equal protection clause of the fourteenth amendment?

STATEMENT OF THE CASE

Article IX of the Illinois Constitution of 1870 granted to the state General Assembly the power to levy a tax

by valuation "so that every person and corporation shall pay a tax in proportion of his, her, or its property."¹

On June 30, 1969, the Illinois Senate and House of Representatives concurred in the adoption of Senate Joint Resolution Number 30 providing for the submission to a referendum vote of Article IX-A, a proposed amendment to the Illinois Constitution of 1870.² Article IX-A

1. Ill. Const. (1870), Art. IX, sect. 1 provides in its entirety:

§ 1. The General Assembly shall provide such revenue as may be needful, by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion of his, her, or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor-dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates."

2. The Illinois Constitution of 1970 was adopted at a special election December 15, 1970 and became generally effective July 1, 1971. Article IX, sect. 5 of the 1970 Constitution provides:

a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.

reads "Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals." At the November 1970 election, the Illinois electorate adopted Article IX-A by a vote of between seven and eight to one.

Respondent Lake Shore Auto Parts Company, a corporation, filed a complaint in the Circuit Court of Cook County, Illinois on December 9, 1970 naming as parties defendant various county officials as well as the director of the Illinois Department of Local Government Affairs, the petitioner herein. The suit was instituted as a class action on behalf of Lake Shore and all other corporations and other non-individuals subject to personal property taxation. Respondent alleged that Article IX-A violated the fourteenth amendment by exempting "from ad valorem personal property taxation on and after January 1, 1971, all personal property owned by "individuals", while au-

b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.

c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes shall not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3(a) of this Article.

thorizing and requiring the continued ad valorem taxation of all personal property owned by entities other than "individuals". Respondent further alleged that Article IX-A effected an amendment of the Illinois Revenue Act of 1939 (Ill. Rev. Stat., 1969, Ch. 120, §§ 482 et seq.) by requiring the imposition of ad valorem taxes solely upon personal property owned by corporations and other non-individuals and requested declaratory and injunctive relief in the form of a holding that the Revenue Act as amended was unconstitutional and unenforceable as to the class represented by respondent.

All parties defendant disputed the respondent's conclusions of law but did not contest the factual allegations of respondent's complaint.

On March 30, 1971, Judge Dahl entered an order finding that Article IX-A amended the Revenue Act of Illinois and "That the Revenue Act of Illinois, as so amended by Article IX-A of the Illinois Constitution, deprives the plaintiff corporation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States: that said Revenue Act of Illinois, to the extent that it purports to impose personal property taxes with respect to the property owned by plaintiff, is therefore unconstitutional, void and of no effect whatsoever." Lehnhausen appealed to the Supreme Court of Illinois and Lake Shore cross appealed a portion of the order relating to the applicability of Article IX-A to personal property taxes assessed prior to January 1, 1971.

A petition for leave to file an original action in the Supreme Court of Illinois was filed with that court on May 10, 1971 by Eugene Maynard, a natural person owning non-business personal property, and by three school districts receiving revenue from the assessment and col-

lection of ad valorem personal property taxes. The petition alleged that the Maynard action was necessary to a proper determination of the issues in the Lake Shore appeal for two reasons: *Lake Shore* did not directly present the issue of the constitutionality of Article IX-A and second, Lake Shore Auto Parts Co. represented only one class of persons directly affected by Article IX-A. The parties defendant in the *Maynard* action are identical to those in *Lake Shore*.

On May 8, 1971, a class action was filed in the Circuit Court of Cook County, Illinois seeking an interpretation of Article IX-A. The parties plaintiff included Clemens K. Shapiro, a natural person owning personal property used for non-business purposes; Jerome Herman, a natural person conducting a business as sole proprietor; Guy and Eugene Ross, natural persons operating a partnership business which owns personal property; and M. Weil and Sons, Inc., a corporation owning property. The parties, representing themselves and all others similarly situated, asserted varying interpretations of Article IX-A. The parties defendant again are identical to those in *Lake Shore*.

Judge Donovan on May 28, 1971, entered an order in the *Shapiro* case holding that Article IX-A exempts from ad valorem property taxation only personal property held by natural persons for non-business purposes. The complaint was dismissed except as to the class of persons represented by Clemens Shapiro. All plaintiffs appealed from this order to the Supreme Court of Illinois.

These three actions—*Lake Shore*, *Maynard*, and *Shapiro*—were consolidated in the Supreme Court of Illinois which rendered its opinion on July 9, 1971. That court found that “the meaning of Article IX-A is that *ad valorem*

taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited." *Lake Shore Auto Parts v. Korzen*, 49 Ill. 2d 137, 148 (1971). The court then held that such a classification, which it found to be dependent solely upon the identity of the owner of property without reference to the nature of the property or the use to which it is put, was irrationally discriminatory and thus in violation of the fourteenth amendment. The court declared Article IX-A unconstitutional, and sustained the validity of Article IX of the 1870 Constitution and of the Revenue Act of 1939.

The Supreme Court of Illinois reversed the judgment in *Lake Shore* and remanded the case with directions to dismiss the complaint. The *Maynard* complaint was dismissed. In *Shapiro*, the judgment dismissing the complaint as to all plaintiffs other than Shapiro was affirmed and the judgment sustaining Shapiro's position was reversed and the case remanded to the trial court with directions to dismiss the complaint.

Lake Shore Auto Parts Company filed a notice of appeal with the Supreme Court of Illinois on November 4, 1971, following a denial by that court of petitions for rehearing filed by various parties to the litigation. Lake Shore subsequently filed with this Court its combined Jurisdictional Statement and petition for writ of certiorari to the Supreme Court of Illinois. Appellants urged the unconstitutionality under the fourteenth amendment of the Revenue Act of 1939. On April 3, 1972, this Court dismissed the appeal for want of jurisdiction and denied the petition for writ of certiorari. *Lake Shore Auto Parts Co. v. Korzen, et al.*, —U.S.— (1972) (Case No. 71-674)

On November 19, 1971, the petitioner herein filed with this Court a petition for writ of certiorari to the Supreme Court of Illinois seeking review of the decision in *Lake Shore Auto Parts Co. v. Korzen*, *supra*. *Lehnhausen v. Lake Shore Auto Parts Co.*, Case No. 71 685. Edward J. Barrett, Clerk of Cook County, filed a separate petition with this Court seeking a writ of certiorari to review the decision in the *Lake Shore* case on November 22, 1971. *Barrett v. Shapiro*, Case No. 71-691. The petitions in *Lehnhausen* and *Barrett* were granted and the cases consolidated by this Court on April 3, 1972.

ARGUMENT

I.

A CLASSIFICATION WHICH DISTINGUISHES CORPORATIONS FROM NATURAL PERSONS FOR THE PURPOSE OF ASSESSING A TAX BY VALUATION ON PERSONAL PROPERTY IS REASONABLE AND COMPORTS FULLY WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Article IX-A amending the Illinois Constitution of 1870 provides: "Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals." The Supreme Court of Illinois interpreted this amendment in *Lake Shore Auto Parts Company v. Korzen*, 49 Ill. 2d 137, 148 (1971) and stated:

"We conclude that the meaning of Article IX-A is that *ad valorem* taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited."

That interpretation of the meaning of Article IX-A is controlling for the purpose of determining the issue raised herein. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Madden v. Commonwealth of Kentucky*, 309 U.S. 83 (1940). The issue raised is whether the equal protection clause requires corporations and natural persons to be treated identically for the purpose of imposing a tax by valuation upon personalty.

Neither the equal protection clause nor the decisions of this Court interpreting the equality requirement man-

date the identical treatment of corporations and individuals for state taxing purposes.

While the federal constitution vests in the federal government the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, "it leaves the states unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment." *Lawrence et al. v. State Tax Commission of State of Mississippi*, 286 U.S. 276, 280 (1932); *Kirtland v. Hotchkiss*, 100 U.S. 491 (1879).

The fourteenth amendment does not preclude all classifications, but rather requires that such distinctions be reasonable in light of the objects of the legislation or of the persons affected thereby. *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578 (1938). A state legislature retains broad discretion to classify persons or objects, and such a classification must be upheld under the fourteenth amendment "if any state of facts reasonably can be conceived that would sustain it." *Metropolitan Casualty Company v. Brownell*, 294 U.S. 580, 584 (1935); *Rast v. Van Deman & Lewis*, 240 U.S. 342 (1916). Legislative distinctions may be narrowly drawn and, if reasonably related to the legislative objective, do not violate the equal protection clause although the distinction may result in practical inequalities. *Magaun v. Illinois Trust and Savings Bank*, 170 U.S. 283 (1898); *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937). A reasonable statutory classification which bears equally upon all members of the class distinguished satisfies the equal protection guaranty. *Great Atlantic and Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 424 (1937).

The states possess perhaps the greatest latitude in promulgating classifications in the field of taxation. *Madden v. Commonwealth of Kentucky*, 309 U.S. 83 (1940). As this Court noted in *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 509 (1937):

"It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. . . . [I]nequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation." (citations omitted).

Accord *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232 (1890); *Lawrence v. State Tax Commission*, *supra*; *Magaun v. Illinois Trust and Savings Bank*, *supra*; *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527 (1931).

Such a statutory classification is presumed to be constitutional. This presumption may be overcome only upon the most explicit proof that the challenged classification is an unreasonable and oppressive discrimination against particular persons or classes. *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 88 (1940). The person attacking the classification bears the burden of negating every conceivable basis supportive of the classification. *Madden v. Commonwealth of Kentucky*, *supra*; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

In the decision below, the Supreme Court of Illinois misapplied these standards to Article IX-A of the 1870 Illinois Constitution and concluded that the classification of corporations differently from individuals for the purpose of imposing a tax by valuation on personal property violated the equal protection clause of the fourteenth amendment.

The court premised its holding on the basic assumption that "When classifications are reasonable, it is because of differences in the nature of property or in the use to which it is put. The nature of the tax is important, too, for what may be a reasonable classification for a license, or for a privilege tax, is not necessarily a reasonable classification for a property tax." (49 Ill. 2d at 149-150).

The court found that "The new article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property." (49 Ill. 2d at 148). Upon this reasoning, the court found the statutory classification irrational.

This decision is deficient in three respects: it totally ignores the legislative objective in abolishing the personal property tax as to individuals; it treats the classes differentiated in a superficial and highly simplistic manner; and it rests upon an incorrect premise that ownership alone may never be a valid basis of classification for the purpose of property taxation.

Unlike many cases, the legislature clearly expressed its intent in adopting Article IX-A for submission to the Illinois electorate for approval. Included with the proposed constitutional amendment was an explanation of the amendment³ as well as detailed arguments in favor of as well

3. "The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870. Article IX-A, thus set-

as against the adoption of Article IX-A. The basic purpose of the Article was to eliminate individual personal property tax in Illinois—a tax which even the opponents of Article IX-A admit is discriminatory, unfair, almost impossible to administer and economically unsound.

“Variations in assessment practices from one assessing district to another are extreme, and result in unfair treatment of some taxpayers while others virtually escape any taxation of this kind. Individuals comprising about a third of the population of the State pay no personal property taxes whatever, while the rest pay taxes on their automobiles, on their household furniture, in some cases on their bank accounts, and other financial resources, and, in rural areas, on their livestock, grain, farm implements, etc.” (Arguments In Favor Of The Proposed Amendment)‘

These arguments in support of eliminating the individual tax are not equally applicable to corporations which are readily identifiable due to mandatory registration of corporations with the State. Ill. Rev. Stat. 1969, Ch. 32, §§ 157.11 (domestic corporations); 157.109 (foreign corporations). Unlike individuals, corporations incorporated within Illinois or doing business within the State are readily identifiable for purposes of tax assessment and collection. The tax is uniformly enforceable as to corpora-

ting aside existing provisions in Article IX, section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations.”

4. The odious nature of the individual tax is best exemplified by the fact that Article IX-A was adopted by an overwhelming majority of the Illinois electorate despite the fact that the consequent loss of approximately \$140,000,000 in revenue would necessarily result in other forms of individual tax increases.

tions since those businesses incorporated under the laws of Illinois may be subject to involuntary dissolution for failure to properly list property subject to the tax. See Ill. Rev. Stat. 1969, Ch. 32, § 157.82; Ill. Rev. Stat. 1969, ch. 120, § 536; *People v. Blue Rose Oil Co.*, 360 Ill. 397 (1935), *cert. den.*, 296 U.S. 605.

A secondary purpose in submitting Article IX-A to the electorate was to encourage the delegates to the state constitutional convention which was then in session to revise the system of taxation then existing in Illinois by providing a fair, equitable, and administratively sound tax structure.

Subsequent to the adoption of Article IX-A, the delegates in fact did revise the revenue structure in Illinois. The delegates apparently viewed the passage of Article IX-A as merely the first step in totally eliminating the ad valorem personal property tax in Illinois by 1979. See Ill. Const. 1970, Art. IX, sect. 5(b) (c).

Thus, the basic purpose underlying the classification established by Article IX-A was to begin the elimination of all ad valorem taxation on personalty by initially excluding from the classification of those persons required to pay the tax the group upon whom the tax in practice fell most unfairly. It was financially impossible to totally abolish the tax immediately. The legislative action of gradual abolition by the elimination of reasonably defined classes from liability to pay the tax is certainly rational and is not constitutionally impermissible. "The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial reexamination. It is enough to satisfy

the Constitution that in drawing them the principle of reason has not been disregarded. . . ." *McGowan v. Maryland*, 366 U.S. 420, 459 (1961) (concurring opinion of Mr. Justice Frankfurter).

The treatment of the Article IX-A classification of individuals and corporations by the court below is highly superficial. The court appears to rely solely upon the label "individual" or "corporation" without regard to the underlying characteristics which identify and indeed, differentiate the entities. The court with great facility states that for the purpose of property taxation, "the identity of the owner is a neutral consideration". (49 Ill. 2d at 151). This completely ignores the fact that the identity of a corporate owner necessarily encompasses the owner's status as an entity created by the state which enjoys the advantages inherent in conducting business in the corporate capacity, which advantages are unavailable to individuals, partnerships, associations and the like. As this Court has noted, the advantages of conducting business in the corporate form are obvious.

"The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships." *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).

And see *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 403, 409 (1928) (Mr. Justice Brandeis, dissenting). To ignore totally these characteristics which serve to identify a corporate owner and to

clearly distinguish him from individual owners of property would prohibit any classification on the basis of corporate-individual distinctions. Such a result is clearly contrary to decisions of this Court and of the Supreme Court of Illinois upholding legislation which separately classifies individuals and corporations for purposes of taxation. See e.g. *Lawrence v. State Tax Commission*, 286 U.S. 276 (1932) (upholding exemption of corporate income derived from out-of-state activities for state income tax purposes); *Home Insurance Company v. New York*, 134 U.S. 594 (1890) (upholding the corporate franchise tax); *Thorpe v. Mahin*, 43 Ill. 2d 36 (1969) (upholding a higher rate of taxation for corporations than for individuals for state income tax purposes.)

The most severe flaw in the decision below, however, is the invalidity of the basic assumption upon which that decision rests. The premise that a classification for purposes of property taxation may never be based upon the ownership of the property is simply erroneous.

In *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), this Court upheld a statutory classification based solely upon ownership of property over an equal protection challenge. Ohio by statute exempted from ad valorem taxation "merchandise or agricultural products belonging to a nonresident if held in a storage warehouse for storage only". (358 U.S. at 522-23). This statute was challenged by an Ohio resident corporation on the ground that the exemption from taxation of nonresident owners violated the equal protection clause since resident owners of property held in a storage warehouse for storage only were required to pay the ad valorem tax on the stored property. Reiterating the broad latitude accorded the states in devising their fiscal systems to insure revenue and to foster their local interests, this Court found that

the fact that "a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy." (358 U.S. at 528). The Court found that the statutory exemption encouraged the location of industry within the state and therefore was not an arbitrary classification violative of the equal protection clause. In conclusion this Court stated:

"Here the discrimination against residents is not invidious nor palpably arbitrary because, as shown, it rests not upon the 'different residence of the owner,' but upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy, which the State is not prohibited from separately classifying for purposes of taxation by the Equal Protection Clause of the Fourteenth Amendment." (358 U.S. at 530).

And similarly, classifications based upon corporate or individual ownership of property have been upheld by this Court as reasonable under the equal protection clause.

In *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), this Court upheld a federal statute imposing a one per cent excise tax on net income over \$5,000 of corporations and joint stock companies (which the Court found had attributes similar to corporations and enjoyed many similar privileges) organized under federal or state law. The tax applied to all income whether or not derived from property used in business. Although individuals and partnerships were not subject to a similar tax, this Court upheld the statute as a reasonable and legitimate exaction laid upon the privilege of conducting business in the corporate capacity.

While the fourteenth amendment was inapplicable in determining the validity of the federal statute questioned

in *Flint*, this Court did note the real and substantial differences between conducting business in the corporate form and in one's capacity as an individual.

"The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals." (220 U.S. at 161-62).⁵

An Arkansas statute which taxed domestic corporations upon stock owned in other domestic corporations but which did not tax unincorporated shareholders was

5. Apart from this apparent recognition of the inherent differences between individuals and corporations for purposes of classification under the fourteenth amendment, the opinion in *Flint* is particularly noteworthy for its discussion of the validity of a federal tax statute challenged under Article I, sect. 9, clause 4 of the federal constitution requiring a capitation or direct tax to be imposed in proportion to the population. That constitutional provision prohibits congress from imposing taxes upon property solely by reason of its ownership. See *Pollock v. Farmers' Loan & T. Co.*, 157 U.S. 429 (1895); *Knowlton v. Moore*, 178 U.S. 41 (1900). The Court found that the statute in *Flint* did not violate the prohibition of such direct taxes since it was a true excise tax within the category of indirect taxation authorized by Article I, sect. 8, clause 1.

It appears that the Supreme Court of Illinois applied the rule limiting the power to impose direct property taxes solely upon the basis of ownership to test the validity of Article IX-A of the 1870 Illinois Constitution. This limitation by its express terms relates only to the power of Congress to levy such taxes. It has no application to state tax legislation.

upheld in *Ft. Smith Lumber Company v. Arkansas*, 251 U.S. 532 (1920). As in the instant case, the tax in *Ft. Smith* was imposed upon personalty owned by a corporation as distinguished from that owned by an individual. This Court stated:

"A discrimination between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the State to insert the distinction in the law." (251 U.S. at 534).

The statute was upheld without the strong showing of legitimate legislative policy present herein.

And in *Lawrence v. State Tax Commission*, 286 U.S. 276 (1932), this Court upheld a Mississippi statute exempting from taxation income earned by corporations from activities carried on outside the state. The exemption was challenged by an individual businessman to whom the exemption was inapplicable upon the basis that the statute violated the equal protection clause.

In upholding this discrimination between corporations and individuals, this Court made several observations which are equally applicable to the present case.

First, the states are not compelled by the Constitution to impose particular modes of taxation. Apart from the taxing power reserved to the federal government, the states are unrestricted in their power to impose reasonable taxes upon domiciliaries owning property within the state or enjoying privileges granted by the state.

Second, in passing upon the constitutionality of such legislation, the controlling factor is the practical operation of the statute and not whether the tax imposed thereby is defined as a property tax or an excise tax.

And third, there is no constitutional requirement that a particular mode of state taxation must be uniform in its application to individuals and to corporations.⁶

In light of these observations, the ruling of the court below in this case was clearly erroneous.

6. In the interim period between the decision in *Ft. Smith Lumber Co.* and the decision in *Lawrence*, this Court decided *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389 (1928). As Mr. Justice Brandeis points out in his dissenting opinion in *Quaker City*, the Court's decision in that case appears to be directly contrary to its holding in *Ft. Smith*. The holding is likewise inconsistent with the subsequent opinion in *Lawrence*.

In *Quaker City*, the Court declared a Pennsylvania statute imposing a tax upon the gross receipts of corporations engaged in the business of transporting passengers within the state unconstitutional under the equal protection clause. The holding was based solely upon the fact that natural persons and partnerships engaged in the same business were not subject to the tax.

As Mr. Justice Brandeis notes, there are real and substantial differences between conducting a business in a corporate capacity and conducting the same business as an individual.


"Since a state is permitted to impose upon the corporation more than a pro rata share of the common burden of taxation, I find nothing in the Federal Constitution which prohibits it from adopting any of the familiar kinds of taxes as the means of the heavier imposition." (277 U.S. at 408).

The holding in *Quaker City* is inconsistent with both prior and subsequent decisions of this Court upon the identical issue and does not constitute authority supportive of the holding of the court below in the instant case.

Article IX-A was adopted by the state legislature and approved by an overwhelming majority of the state electorate as a means of implementing a valid state policy—to abolish a highly discriminatory tax on personalty. Since the tax could not immediately be eliminated without dire financial consequences, the legislature chose initially to exempt the class of persons upon whom the tax fell most unfairly. This was merely the first step in totally eliminating the tax in Illinois by 1979. It is a reasonable and non-arbitrary method of implementing a valid legislative objective.

The classification of individuals differently from corporations for this purpose is reasonable because individuals and corporations are inherently different. The equal protection clause does not require things different in fact to be treated in law as though they were the same. *Tigner v. Texas*, 310 U.S. 141 (1940). Additionally, it must be noted that in practice, the tax on personalty is uniformly enforced against corporations while there was wide disparity in the enforcement of the tax on individuals. The classification is clearly drawn and operates uniformly upon the members of each class: individuals are totally exempt; corporations are not.

This Court long has recognized the validity of such classifications between corporate and individual owners of property for purposes of state taxation. It is irrelevant whether the particular tax is defined as a property tax or a franchise tax. The classification imposed by Article IX-A comports fully with the requirements of the equal protection clause and must be upheld.



CONCLUSION

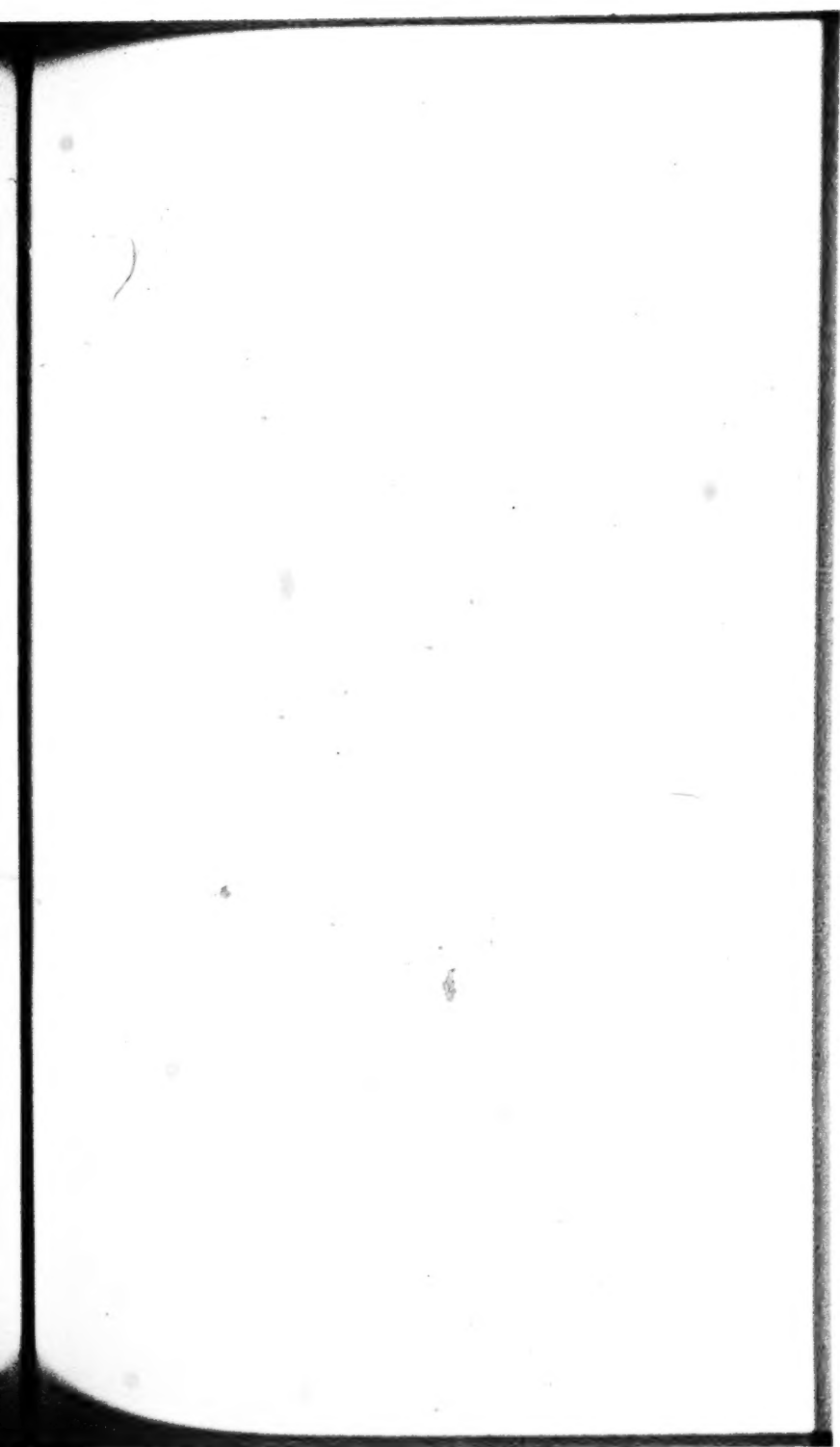
For the foregoing reasons, the Petitioner respectfully requests this Court to reverse the decision of the Supreme Court of Illinois in this case.

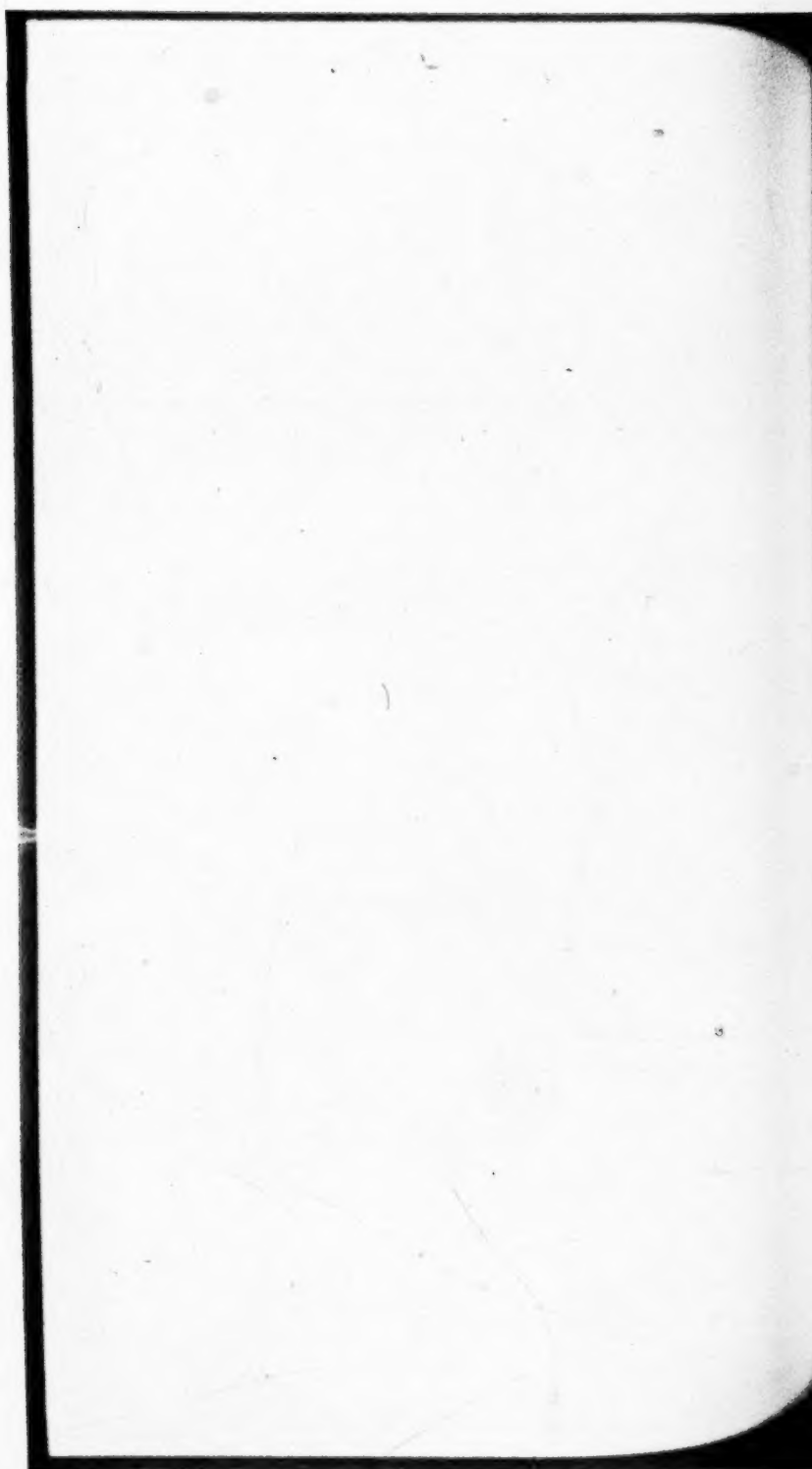
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1971

ROBERT J. LEHNHAUSEN, Director of Department of Local
Government Affairs of the State of Illinois,

Petitioner,

No. 71-685

vs.

LAKE SHORE AUTO PARTS CO., et al.,

Respondent.

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

No. 71-691

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Illinois.

**BRIEF OF RESPONDENTS CLEMENS K. SHAPIRO
AND MEMBERS OF HIS CLASS.**

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1971

No. 71-685 and No. 71-691 — (Consolidated)

ROBERT J. LEHNHAUSEN, Director of Department of Local
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On Writ Of Certiorari To The Supreme Court Of Illinois.

**BRIEF OF RESPONDENTS CLEMENS K. SHAPIRO
AND MEMBERS OF HIS CLASS.**

ARGUMENT

Respondents Clemens K. Shapiro and members of his class are natural persons (individuals) who own personal property in Cook County, Illinois, which is used for their personal enjoyment and that of their families. They constitute one of the four district and separate classes who filed their complaint for relief jointly in the Circuit Court of Cook County, Illinois. The other three classes comprise the following:

2. Individuals who own personal property used for business purposes.

3. Partnerships owning personal property used for business purposes.

4. Corporations owning personal property.

It is the contention of the *Shapiro* respondents that amending Article IX-A of the Illinois Constitution of 1870 prohibited any personal property tax on personal property used for the enjoyment of themselves and their families. Their contention was sustained by Judge Donovan in the original action filed in the Circuit Court of Cook County. The Illinois Supreme Court overruled Judge Donovan, and this is one of the bones of contention in the case at bar.

These respondents find themselves in the rather fortunate and advantageous position of having their contention supported completely or to a limited degree by certain duly elected public officials. The Governor of the State of Illinois, the Attorney General of Illinois and the State's Attorney of Cook County, Illinois, each in his own

right, have filed with this Court their separate petitions for the issuance of a writ of certiorari. In their respective capacities as such officials, they have seen fit to seek redress from this Court to correct what they obviously consider a miscarriage of justice before the Illinois Supreme Court.

The Governor of Illinois has filed his *amicus curiae* brief in support of the issuance of a writ of certiorari, the Attorney General of Illinois has filed his Petition and Amended Petition for the issuance thereof and his Brief upon the granting of said writ by this Court, and the State's Attorney of Cook County has also filed his Petition for the issuance of the writ, which now stands as his Brief in this cause.

Having had the benefit of examining the pleadings already filed with the Clerk of this Court, these respondents deem the issues to be fully presented and argued therein. A rash of repetition and redundancy has already appeared in this case. Any further presentation would constitute a belaborment of the issues rather than be of any significant additional assistance to this Court in deciding the issues before it.

The *Shapiro* respondents deem it their duty to call the Court's attention to a variance between the contention raised by the Attorney General in his original as well as in his Amended Petition for certiorari on the one hand, and the contention advanced in his Brief filed after the granting of the writ. On page 38 of his original Petition for certiorari and on page 41 of his Amended Petition, the Attorney General pleaded in the alternative "that either the dissenting opinion of Justice Davis was correct, or that the decision of Judge Donovan in the *Shapiro* case was correct." However, in his Brief filed herein the Attor-

ney General has abandoned his alternative pleading and is now standing solely on his contention that only the dissenting opinion of Justice Davis was correct.

In view of the foregoing, these *Shapiro* respondents accept and adopt the presentation of the issues by the Attorney General of Illinois, but do not accept his contention that only the dissenting opinion of Justice Davis was correct. They do accept and adopt the presentation of the issues by the State's Attorney of Cook County in its entirety. Its sum and substance is to the effect that only the decision of Judge Donovan in the *Shapiro* case was correct.

CONCLUSION

Presented for this Court's consideration are four diverse and conflicting rulings by the Illinois courts in the case at bar as follows:

1. The majority opinion of the Illinois Supreme Court ruled that amending Article IX-A of the Illinois Constitution of 1870 violates the fourteenth amendment to the United States Constitution and is therefore unconstitutional.

2. The dissenting opinion of Justice Davis of the Illinois Supreme Court found that said Article IX-A did not violate said fourteenth amendment and that its effect was to retain the personal property tax on corporations while relieving *all* individuals from said tax.

3. Judge Dahl of the Circuit Court of Cook County ruled that said Article IX-A resulted in removing the personal property tax from the personal property of *all* corporations and *all* individuals.

4. Judge Donovan of the Circuit Court of Cook County ruled that said Article IX-A exempted the payment of personal property taxes by individuals on personal property owned by them and used for the personal enjoyment of themselves and their families.

The *Shapiro* respondents' contention, supported fully by the State's Attorney of Cook County and inclusively by the Attorney General of Illinois, is that the ruling of Judge Donovan of the Circuit Court of Cook County is correct. Therefore they respectfully pray that this Court find, order and decree that Amending Article IX-A of the Illinois Constitution of 1870 is valid and constitutional in all respects and is immune to attack under any provision of said Constitution and the United States Constitution, and that said Amending Article IX-A declares its prohibition as to any personal property tax on the personal property owned by individuals and used for their personal enjoyment and that of their families.

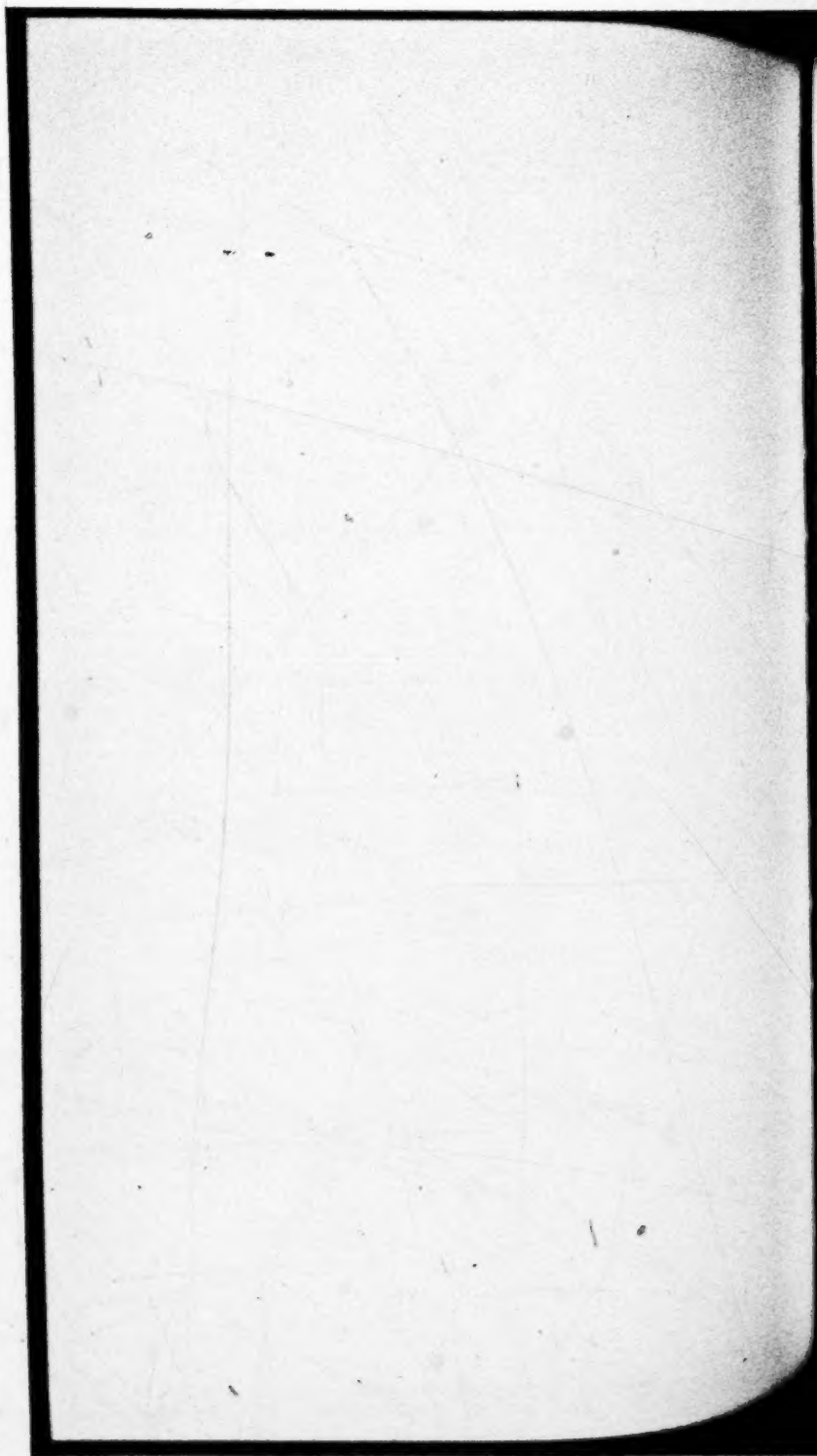
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Of Counsel.



IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1971

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EDWARD J. BARRETT,

County Clerk of Cook County, Illinois, et al.,

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On Writ Of Certiorari To The
Supreme Court Of Illinois

MOTION FOR LEAVE TO FILE A BRIEF AS
AMICI CURIAE

**MOTION FOR LEAVE TO FILE A BRIEF AS
AMICI CURIAE**

The American National Bank and Trust Company of Chicago; Chicago Title and Trust Company; Continental Illinois National Bank & Trust Company of Chicago; The First National Bank of Chicago; Harris Trust and Savings Bank; La Salle National Bank; The Northern Trust Company; Amalgamated Trust & Savings Bank; Beverly Bank; Chicago City Bank and Trust Company; Drovers National Bank; Exchange National Bank of Chicago; First Bank of Oak Park; First National Bank and Trust Company of Evanston; Mercantile National Bank of Chicago; National Boulevard Bank of Chicago; Northwest National Bank; Pioneer Trust & Savings Bank; Pullman Bank and Trust Company; Sears Bank and Trust Company; State National Bank; and Suburban Trust & Savings Bank, all being members of the Corporate Fiduciaries Association of Illinois, by their attorneys Concannon Dillon Snook & Morton, move for leave to file a Brief as Amici Curiae in the above entitled cases as consent of the attorneys for the petitioners and respondents has not been obtained, and in support thereof state as follows:

1. The interest of the members of the Corporate Fiduciaries Association of Illinois in these cases arises from the fact that each is authorized to accept and execute trusts in the State of Illinois, and that pursuant to said grant they have and are acting, either alone or as co-fiduciaries, in various fiduciary capacities, namely: testamentary trustee, trustee appointed by court, trustee under written agreement, declaration or instrument of trust, executor, administrator, administrator to collect, guardian, conservator, agent, custodian, custodian under

the Illinois Uniform Gift to Minors Act, depositary, and other like fiduciary capacities holding personal property for the benefit of natural persons.

2. Article IX-A of the Constitution of the State of Illinois of 1870, as amended and approved, provides:

"Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

3. The respondents in the cases herein allegedly represent natural persons owning personal property used for their own personal enjoyment and that of their families; natural persons conducting a business as a sole proprietor; natural persons operating a partnership business which owns personal property; and corporations owning personal property. The petitioners represent the citizens and people of the State of Illinois and Cook County, Illinois. Petitioners herein represent fiduciaries, both corporate and individual, whether acting as a sole fiduciary or a co-fiduciary, who are holding personal property for the use or benefit of natural persons.

4. The word "individuals" contained in Article IX-A of the Constitution of the State of Illinois of 1870, as amended and approved, has been used synonymously with "natural persons" by the Supreme Court of the State of Illinois in the cause below.

WHEREFORE, Petitioners herein pray for leave to file a brief as amici curiae for the following reasons:

1. To show that the term "individuals" as utilized in Article IX-A of the Constitution of the State of Illinois of 1870, as amended and approved, was clearly intended to and does encompass all fiduciaries, both corporate and individual, whether acting as a sole fiduciary

or as a co-fiduciary, who are holding personal property for the use or benefit of natural persons.

2. That such a showing by *amici curiae*, together with the showing made by all other classes represented by the petitioners and respondents herein, will enable this Honorable Court to utilize language in its decision which will be dispositive of all issues and thereby serve the public policy by avoiding unnecessary future litigation upon reversal or reversal and remand of the decision of the Supreme Court of the State of Illinois.

3. That the arguments and authorities sought to be submitted to this Honorable Court for its consideration in the determination of the definition of "individuals" as used in Article IX-A of the Constitution of the State of Illinois of 1870, as amended and approved, in a brief by *amici curiae*, will not be predicated upon any evidentiary matters but rather will be predicated upon precedent, the explanation of the proposed amendment by the Illinois Legislature as required by statute (Appendix A, pages A1-A7); an opinion issued and promulgated by the Attorney General of the State of Illinois, in relation to said amendment to the Constitution (Appendix B, pages A8-A14); and an opinion issued and promulgated by the State's Attorney of Cook County, Illinois (Appendix C, A15-A16).

Respectfully submitted

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THE LEGISLATIVE HISTORY OF THE PASSAGE OF THE ILLINOIS SENATE JOINT RESOLUTION NO. 30 TO PROHIBIT THE TAXATION OF PERSONAL PROPERTY BY VALUATION AS TO "INDIVIDUALS" INDISPUTABLY DEMONSTRATES THAT BOTH THE LEGISLATURE AND ELECTORATE OF ILLINOIS UNDERSTOOD AND INTENDED THAT THE TERM "INDIVIDUALS" INCLUDES ALL FIDUCIARIES HOLDING PERSONAL PROPERTY FOR THE USE OR BENEFIT OF NATURAL PERSONS6-12

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IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1971

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ROBERT J. LEHNHAUSEN,

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On Writ Of Certiorari To The
Supreme Court Of Illinois

BRIEF OF AMICI CURIAE

Prefatory Statement

The American National Bank and Trust Company of Chicago; Chicago Title and Trust Company; Continental Illinois National Bank & Trust Company of Chicago; The First National Bank of Chicago; Harris Trust and Savings Bank; La Salle National Bank; The Northern Trust Company; Amalgamated Trust & Savings Bank; Beverly Bank; Chicago City Bank and Trust Company; Drovers National Bank; Exchange National Bank of Chicago; First Bank of Oak Park; First National Bank and Trust Company of Evanston; Mercantile National Bank of Chicago; National Boulevard Bank of Chicago; Northwest National Bank; Pioneer Trust & Savings Bank; Pullman Bank and Trust Company; Sears Bank and Trust Company; State National Bank; and Suburban Trust & Savings Bank, all being members of the Corporate Fiduciaries Association of Illinois, (hereinafter referred to as "Fiduciaries"), adopt the briefs and arguments of the Petitioners and Respondents advocating that Article IX-A of the Constitution of the State of Illinois of 1870, as amended and approved, is a valid constitutional amendment and in full force and effect, and exempts "individuals" from taxation of personal property.

The Fiduciaries will limit this brief and argument solely to a showing that "individuals" as used in Article IX-A of the Constitution of the State of Illinois of 1870, as amended and approved, includes fiduciaries, both corporate and individual, whether acting as a sole fiduciary or as a co-fiduciary who are holding personal property for the use or benefit of natural persons.

Opinion Below

The opinion and dissent thereto of the Supreme Court of the State of Illinois is reported in 49 Ill. 2d 137 and 237 N.E. 2d 592.

Jurisdiction

The jurisdiction of this Court is invoked to review a final judgment of the Supreme Court of Illinois pursuant to Title 28 U.S.C. § 1257 (3). The decision of the court below was rendered on July 9, 1971. A petition for rehearing was denied on August 24, 1971. The petitions for writ of *certiorari* were granted April 3, 1972.

Constitutional Provision

Article IX-A of the Constitution of the State of Illinois of 1870, as amended and approved, provides:

"Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

Question Presented

The overriding issue presented in these cases is whether the exemption of "individuals" from personal property tax by Article IX-A of the Constitution of the State of Illinois of 1870, as amended and adopted, is violative of the Fourteenth Amendment to the Constitution of the United States.

Ancillary thereto the *amici curiae*, Fiduciaries, wish to make it eminently clear that the term "individuals" as utilized in Article IX-A of the Constitution of the State of Illinois of 1870, as amended and approved, includes and encompasses all fiduciaries, both corporate

and individual, whether acting as a sole fiduciary or as a co-fiduciary, who are holding personal property for the use or benefit of natural persons.

Statement of the Case

The *amici curiae* fiduciaries adopt the statement of the case contained in the brief of the petitioner Robert J. Lehnhausen, filed by William J. Scott, Attorney General of the State of Illinois.

Summary of Argument

Article IX-A of the Constitution of the State of Illinois of 1870, as amended and approved, exempts "individuals" from personal property tax. The term "individual" includes all fiduciaries, both corporate and individual, whether acting as a sole fiduciary or as a co-fiduciary, who are holding personal property for the use or benefit of natural persons, as evidenced by:

(a) explanation and arguments of the Legislature of the State of Illinois published and distributed in compliance with statute by the Secretary of State of the State of Illinois, to all of the electorate, prior to the submission of Article IX-A of the Constitution of the State of Illinois of 1870 to the electorate for their adoption or rejection;

(b) the opinion, issued and promulgated by the Attorney General of the State of Illinois, on January 22, 1971, relative to the validity and construction of Article IX-A of the Constitution of the State of Illinois of 1870, as amended and approved; and

(c) the opinion issued and promulgated by the State's Attorney of Cook County, Illinois, on December 28, 1970, relative to the question whether Article IX-A of the Constitution of the State of Illinois of 1870, as amended and approved, applies to personal property held in a fiduciary capacity for the use and benefit of natural persons.

ARGUMENT

THE LEGISLATIVE HISTORY OF THE PASSAGE OF THE ILLINOIS SENATE JOINT RESOLUTION NO. 30 TO PROHIBIT THE TAXATION OF PERSONAL PROPERTY BY VALUATION AS TO "INDIVIDUALS" INDISPUTABLY DEMONSTRATES THAT BOTH THE LEGISLATURE AND ELECTORATE OF ILLINOIS UNDERSTOOD AND INTENDED THAT THE TERM "INDIVIDUALS" INCLUDES ALL FIDUCIARIES HOLDING PERSONAL PROPERTY FOR THE USE OR BENEFIT OF NATURAL PERSONS.

On May 15, 1969, the Senate of Illinois adopted Senate Joint Resolution No. 30, as amended, reading as follows:

"Senate Joint Resolution No. 30

Resolved, By the Senate of the Seventy-sixth General Assembly of the State of Illinois, the House of Representatives concurring herein, that there shall be submitted to the electors of the State for adoption or rejection at the next election of members of the General Assembly of the State of Illinois, in the manner provided by law, a proposition to add Article IX-A to the Constitution, the added Article to read as follows:

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971."

(Journal of the Senate of the Seventy-sixth General Assembly of the State of Illinois of April 29, 1969, pgs. 1038-1039 and of May 15, 1969, pgs. 1407-1408).

Senate Joint Resolution No. 30 was thereafter adopted by the House of Representatives of the State of Illinois on June 30, 1969. (Journal of the House of Representatives of the Seventy-sixth General Assembly of the State of Illinois of June 30, 1969, pg. 5076).

Section 2 of Article XIV of the Illinois Constitution of 1870, dealing with amendments proposed to the Illinois Constitution *by the Illinois General Assembly*, requires that a proposed amendment "be submitted to the electors of this state for adoption or rejection, at the next election of members of the General Assembly, in such manner as may be prescribed by law. Each proposed amendment shall be published in full at least three months preceding the election, . . ." (Emphasis Added).

In accordance with the foregoing constitutional requirement that amendments to the Constitution of Illinois proposed by the General Assembly of Illinois be submitted to the electors for adoption or rejection "in such manner as may be prescribed by law," the General Assembly of Illinois enacted an Act entitled "An Act to provide the manner of proposing amendments to the Constitution, and submitting the same to the electors of the State", approved March 14, 1877, as amended (Ill. Rev. Stat. 1969, Ch. 7½, Secs. 1-8). Section 2 of said Act provides, in part, as follows:

"The General Assembly in submitting an amendment to the Constitution to the electors, shall prepare a brief explanation of such amendment, a brief argument in favor of the same, and the form in

which such amendment will appear on the separate ballot . . . The minority of the General Assembly, if they so desire, may also prepare a brief argument against such amendment. *** In addition to the notice hereby required to be published, the Secretary of State shall also cause the existing form of the constitutional provision proposed to be amended, the proposed amendment, the explanation of the same, the arguments for and against the same, and the form in which such amendment will appear on the separate ballot, to be published in pamphlet form in 8 point type or the equivalent thereto; and in cities, villages and incorporated towns having boards of election commissioners, the Secretary of State shall furnish such boards with a sufficient supply of such pamphlets to enable the boards to supply a copy thereof to every elector in their respective cities, villages and incorporated towns and such boards shall mail a copy of the pamphlet to every registered elector in their respective municipalities at least 40 days prior to the election, and shall also supply copies thereof to every elector applying to them. In all counties, the Secretary of State shall furnish a sufficient supply of such pamphlets to the several county clerks to enable the clerks to supply a copy thereof to every elector in their respective counties, outside of cities, villages or incorporated towns that have a board of election commissioners and the county clerks shall mail a copy thereof to every such registered elector in their respective counties not less than 40 days prior to the election and shall also supply copies thereof to every elector applying for them. ***"

For the purpose of complying with the provisions of the aforesaid statute, the Illinois Senate adopted Senate Joint Resolution No. 43 providing for the appointment of a special committee on constitutional amendments, consisting of members of the Illinois Senate and of mem-

bers of the Illinois House of Representatives, to prepare a brief argument in favor of and against such amendment, and to submit the Committee's report to the General Assembly of Illinois (Journal of the Senate of the Seventy-sixth General Assembly of the State of Illinois of June 30, 1969, pg. 3459).

In compliance with the Illinois Senate Joint Resolution No. 43, a special committee on constitutional amendments was appointed to prepare the explanation of, arguments in favor of and against, and the form of ballot on the proposed amendment to add Article IX-A to the Illinois Constitution of 1870 to prohibit the taxation of personal property by valuation as to individuals.

Such explanation, arguments and form of ballot were prepared by said Committee and approved and adopted by the Seventy-sixth General Assembly of the State of Illinois¹ and was published by the Secretary of State in pamphlet form² and mailed to every registered voter in the State of Illinois more than 40 days prior to the election of November 3, 1970, on which date the proposed amendment to add Article IX-A to the Illinois Constitution of 1870 so as to prohibit the taxation of personal property by valuation as to individuals was voted upon and adopted by the people of the State of Illinois.

1. Journal of the House of Representatives of the Seventy-sixth General Assembly of the State of Illinois of May 6, 1970 pgs. 30-33 and Journal of the Senate of the Seventy-sixth General Assembly of the State of Illinois of May 7, 1970, pgs. 8-11.

2. See Appendix A, pages A1-A7.

The argument prepared by the General Assembly against the proposed Amendment to add Article IX-A to the Illinois Constitution of 1870, which, as above noted, was approved and adopted by the Illinois General Assembly and mailed to every registered voter in the State of Illinois prior to the election at which the proposed Amendment was voted upon by the electorate, stated in part, as follows:

"It is discriminatory because it creates a tax liability based on the nature of the ownership of property and not because of the nature of the property itself. That which is *owned by or held in a fiduciary capacity for the benefit of natural persons* is exempted from taxes; that which is owned by corporations, etc., is subject to taxes." (Emphasis Added) (App. A4-A5).

Likewise, opinions issued by the Attorney General of Illinois on January 22, 1971 and by the State's Attorney of Cook County, Illinois, on December 28, 1970, each held that personal property held in a fiduciary capacity for the benefit of natural persons were exempt from personal property taxes under the Amendment adding Article IX-A to the Illinois Constitution of 1870. (Appendices B, pages A8-A14, and C, pages A15-A16).

The burden or incidence of personal property taxation in Illinois in connection with personal property held in a fiduciary capacity is borne by the beneficiary of the fiduciary estate. Section 14 of the Illinois Principal and Income Act provides, in part, as follows:

"All ordinary expenses incurred in connection with the trust estate or with its administration and management including regularly recurring taxes assessed against any portion of the principal *** shall be paid out of income." (Ill. Rev. St. 1971, Ch. 30, Sec. 172 (1)).

In *Wise v. Commonwealth*, 95 S.E. 632, 122 Va. 693, (Supreme Court of Appeals of Virginia—1915), two trustees, who were non-resident of Virginia, argued that intangible personal property held in trust by them for the benefit of a Virginia resident was not subject to personal property taxes assessed in Virginia under a Virginia Act providing in part as follows: "If the property is held *** for the benefit of another, it shall be listed by and taxed to the trustee in the county of his residence ***."

In response to the argument advanced by the non-resident trustees the Supreme Court of Appeals of Virginia stated at page 633 of 95 S. E., as follows:

"Intangible personal property in the hands of a nonresident trustee, in the income from which a person over the age of 21 years residing in this state has a life estate, is, by virtue of the statute in such case made and provided (Acts 1897-98, p. 519, amending Code, § 492), taxable in this state in the county or corporation in which the beneficiary resides. *The tax, though assessed in the name of the trustee, is not against him but the beneficiary.* He is the mere conduit through the medium of which the tax upon the property of a citizen passes into the treasury."

* * *

"Though the tax is assessed in the name of the trustee, *the burden is, in reality, imposed upon the beneficial owner*, a resident of the commonwealth, who enjoys the protection of its laws along with other citizens, and ought, in fairness, to contribute her due proportion of revenue for the support of the government." ***

* * *

"The contention that the construction indicated would render the statute unconstitutional proceeds upon the hypothesis that the tax is against the non-resident trustee, whereas he is personally unaffected by the imposition, and is but the conduit through the medium of which the tax upon the property of a citizen passes into the state treasury. *Hunt v. Perry* (165 Mass. 287), 43 N. E. 103; *Lewis v. County of Chester*, 60 Pa. 325." (Emphasis Added).

(Certiorari was denied by the U. S. Supreme Court, 39 S. Ct. 287; 247 U.S. 582; 63 L. Ed. 432).

Fiduciaries, as *amici curiae*, submit that it was clearly not the intent of the General Assembly of Illinois nor of the electorate of the State of Illinois, who were notified and informed prior to voting upon the Amendment that personal property "owned by or held in a fiduciary capacity for the benefit of natural persons" was exempt from personal property taxation, to impose a personal property tax on a minor represented by his Guardian; on the incompetent represented by his Conservator; on the widow or children represented by a Trustee; on the heirs and individual legatees represented by the personal representative of a decedent's estate; or on any individual who is represented by another acting in a fiduciary capacity.

CONCLUSION

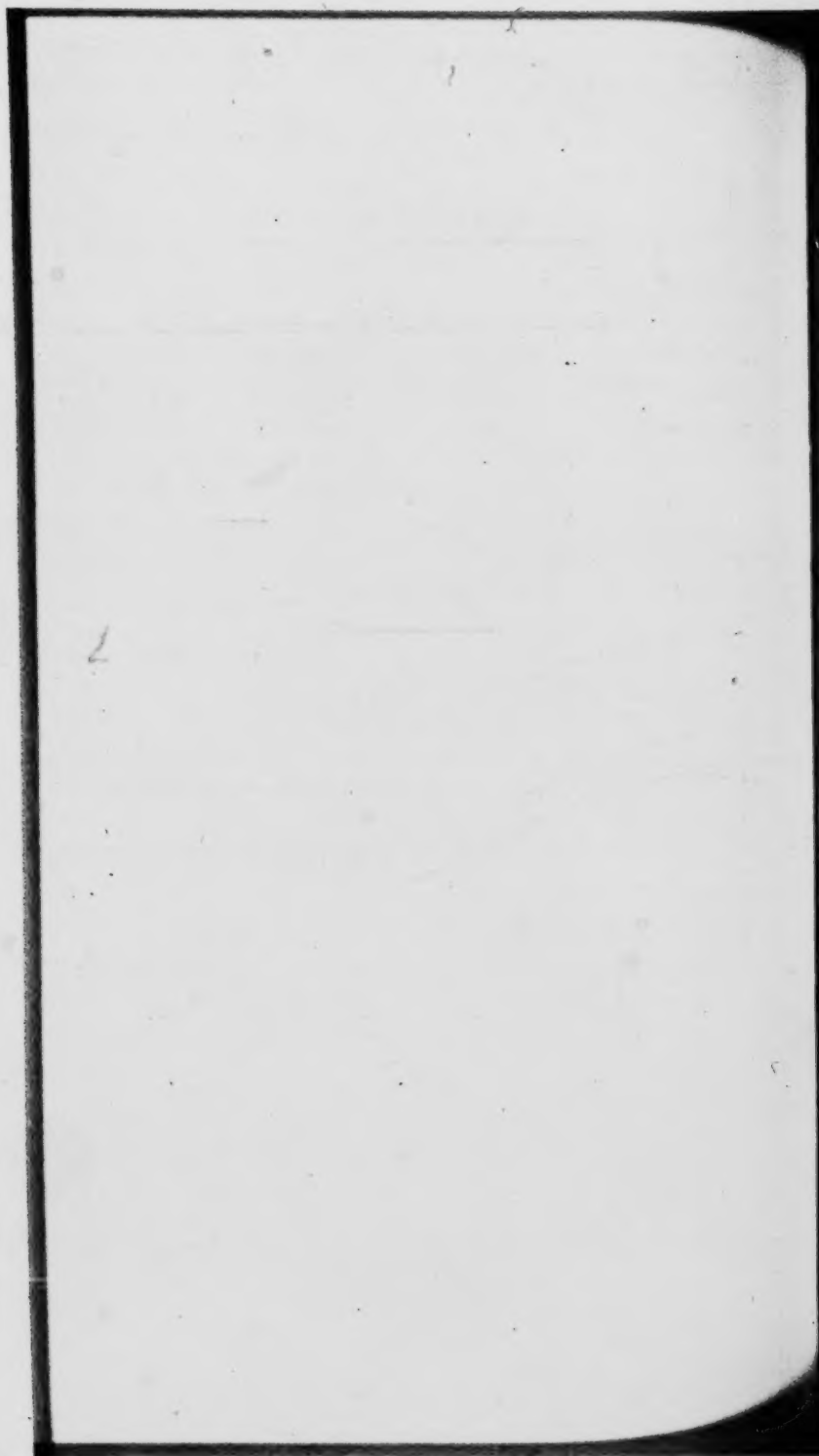
Should this Honorable Court reverse or reverse and remand the decision of the Supreme Court of the State of Illinois and hold that the Amendment adding Article IX-A to the Illinois Constitution of 1870 is constitutional, then these *amici curiae* respectfully urge that this Court utilize language in its opinion that the term "individuals" as used in the Amendment adding Article IX-A to the Illinois Constitution of 1870, includes all fiduciaries, both corporate and individual, whether acting as a sole fiduciary or as a co-fiduciary, who are holding personal property for the use or benefit of natural persons.

Respectfully submitted,

WILLIAM R. DILLON,

Concannon Dillon Snook & Morton,
111 West Washington Street,
Chicago, Illinois 60602 (726-1704),

*Attorneys for Amici Curiae,
Members of The Corporate
Fiduciaries Association of Illinois.*



A1

APPENDIX A
AMENDMENT

to the

CONSTITUTION OF ILLINOIS

THAT WILL BE SUBMITTED TO THE VOTERS
NOVEMBER 3, 1970

This folder includes

PROPOSED AMENDMENT TO CONSTITUTION
EXPLANATION OF PROPOSED AMENDMENT
ARGUMENTS IN FAVOR OF PROPOSED
AMENDMENT
ARGUMENTS AGAINST PROPOSED AMENDMENT
FORM OF BALLOT

Published in compliance with Statute

by

PAUL POWELL

Secretary of State

(Printed by Authority of the State of Illinois)

To the Electors of the State of Illinois:

At the general election to be held on the 3rd day of November, 1970 a blue ballot will be given to you and you will be called upon in your sovereign capacity as citizens to adopt or reject the following proposed amendment to the Constitution of Illinois.

PROPOSED AMENDMENT TO ADD ARTICLE IX-A

(Prohibition of taxation of personal
property by valuation as to individuals.)

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971.

EXPLANATION OF AMENDMENT (See Form of Ballot)

ARGUMENTS IN FAVOR OF THE PROPOSED AMENDMENT

The purpose of the proposed addition of Article IX-A to the Constitution is to abolish the unfair and unworkable taxation of personal property of individuals throughout Illinois.

The present taxation of personal property of individuals is unfair because:

—It is not evenly administered, and cannot be. Variations in assessment practices from one assessing district to another are extreme, and result in unfair treatment of some taxpayers while others virtually escape any taxation of this kind. Individuals comprising about a third of the population of the State pay no personal property taxes whatever, while the rest pay taxes on their automobiles, on their household furniture, in some cases on their bank accounts and other financial resources, and, in rural areas, on their livestock, grain, farm implements, etc.

—The taxation of personal property is a relic of the 19th century, when agriculture was the predominant occupation in the State, when a man's worth and ability to pay could be measured by his material possessions, when intangible assets were not at all common, and when personal property could not be easily hidden from assessors. Things are different today. Intangible assets are common, but not easily assessed and taxed. Thus, personal property taxation is now made, for the most part, of necessities of modern life such as family automobiles and a family's furniture.

—Personal property taxation encourages cheating and evasion. Virtually every property taxpayer in the State perjures himself every year because he does not report all of his personal property to the assessor. This built-in feature of personal property taxation cannot do otherwise than to aid and abet the disintegration of the moral values of our society which we have cherished for so long and which we see slipping away day by day.

If adopted by the people of Illinois, this amendment to our Constitution will:

—Remove the necessity of cheating on taxes, remove the impossible demands now placed on assessors to achieve fair taxation, and, above all, remove an onerous and universally despised tax program.

—Modernize the revenue provisions of our Constitution, an objective of which the people of Illinois have indicated they are heartily in favor.

The abolition of personal property taxation should be accomplished by constitutional reform. It should not be left to statutory action, which cannot be permanent in nature and which most certainly would lead to continuous court action and indecision as to exactly what was intended.

Even the placing of this question on the ballot for the people to consider has been a powerful indication to Illinois' constitutional convention delegates that the people prefer to end this unfair kind of taxation. At the time these arguments in favor of amending the Constitution were prepared, it could not be known what the constitutional convention's final decision on personal property taxation would be. But adoption of this amendment will indicate, once and for all time, that the people are fed up with unfair taxation.

The loss of revenue to local governments in Illinois if personal property taxation of individuals is abolished will be considerable, to be sure. But modernization of our entire tax system will make possible replacement of this needed revenue through other, fairer, sources.

In short, there is no compelling argument which can now be raised against adoption of this amendment. And there is every reason to support it.

ARGUMENTS AGAINST THE PROPOSED AMENDMENT

There is no question of the dissatisfaction with the taxation of personal property at present in Illinois. It is discriminatory, it is unfair, it is almost impossible to administer, and it is economically unsound. But the same can be said of the proposed amendment, and moreover the amendment, if adopted, could be injurious to the finances of local governments because it makes no provision for the replacement of the lost revenues.

—It is discriminatory because it creates a tax liability based on the nature of the ownership of property and not because of the nature of the property itself. That which is owned by or held in a fiduciary capacity for the benefit of natural persons is exempted from taxes; that which

is owned by corporations, etc., is subject to taxes. How will this affect a piece of equipment still titled to the original owner, a corporation, while the user makes payments on it? Business interests generally will be at a disadvantage under this amendment.

—It is unfair because it gives no relief to merchants and manufacturers whose inventories are now subject to tax, depending on the practice of the assessor in their locale, so that they may be at a competitive disadvantage with merchants elsewhere and, in the case of industry, with out of State manufacturers.

—It will be almost impossible to administer the amended tax equally because the location of some kinds of personalty, such as shares of intangibles not owned by individuals, which can be shifted out of the State, but this is not true for tangible personalty — machinery, equipment, etc. — owned by a corporation.

—It is economically unsound because it places a burden on the corporate form of business organization. Under the new State income tax law, corporations are taxed at a higher rate than individuals; why should they be subjected to the continued personal property tax when individuals are not?

It will be injurious to local governments because no provision is made to replace the lost revenue. It is estimated that from 6 to 7 percent of all property on the tax rolls now falls in the class of individually owned personal property that will be exempted. Where will this loss of revenue (about \$140,000,000) be made up? By raising real estate taxes? The income tax proceeds are being shared with cities and counties; what about other types of local governments? How will they make up the difference?

The amendment should be defeated. The only useful purpose it can serve is to induce the Constitutional Convention to provide a fair, equitable, and administratively sound tax system, with an allocation of revenues to local governments to replace any loss from discontinuing or modifying the present system of personal property taxation.

FORM OF BALLOT
PROPOSED AMENDMENT TO ADD ARTICLE IX-A
(Prohibition of taxation of personal
property by valuation as to individuals.)

EXPLANATION OF AMENDMENT

The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870. Article IX-A, thus setting aside existing provisions in Article IX, section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations.

Place an X in blank opposite "Yes" or "No" to indicate your choice.

- ☐ YES For the proposed amendment to add Article IX-A to the Constitution. (Prohibition of taxation of personal property by valuation as to individuals.)
- ☐ NO

A7

CAPITOL BUILDING
SPRINGFIELD, ILLINOIS
OFFICE OF THE SECRETARY OF STATE

I, PAUL POWELL, Secretary of State of the State of Illinois, do hereby certify that the foregoing contains a true and correct copy of the proposed amendment, the explanation of the proposed amendment, the arguments in favor of the proposed amendment, the arguments against proposed amendment and the form in which said amendment will appear upon a separate blue ballot pursuant to Senate Joint Resolution No. 30 of the Seventy-sixth General Assembly, the original of which is on file in this office.

IN WITNESS WHEREOF, I hereunto set my hand and affix the Great Seal of the State of Illinois. Done at my office in the Capitol Building in the city of Springfield this 27th day of February A.D. 1970, and of the Independence of the United States the one hundred and ninety-fourth.

PAUL POWELL,

Secretary of State.

(SEAL)

APPENDIX B

January 22, 1971

FILE NO. S-260
TAXATION:
Personal Property
Tax Exemption

—
Honorable Robert J. Lehnhausen
Director, Department of Local
Government Affairs
325 West Adams Street
Springfield, Illinois 62704

Dear Sir:

I have your recent letter wherein you state:

"The Department of Local Government Affairs is vested with certain statutory powers and duties relating to the assessment of property for property tax purposes, among which are the following:

"1. 'Assist and advise the local governments of the State in matters pertaining to—the assessment and equalization of property—.'

"2. 'Direct and supervise—the assessment for taxation of all real and personal property in this State—.'

"3. 'Confer with, advise and assist local assessment officers relative to the assessment of property for taxation'. (Chapter 127, Paragraph 63b14.13 and Chapter 120, Paragraph 611, I.R.S.)

"Pursuant to such statutory provisions, inquiries have been made by local assessment officers concerning the effect of the amendment to the Illinois Constitution, approved by referendum on November 3, 1970, prohibiting, as to individuals, the taxation of personal property by valuation.

"We would appreciate receiving your opinion as to the following:

"1. Is an individual proprietor to be exempt from taxation on his business inventory and other personal property used in such business?

"2. Is the individual farmer exempt from taxation on farm equipment and personal property owned in his capacity as an individual farmer?

"3. Is the personal property of partnerships exempt, or will such personal property be taxable under the Revenue Act of 1939 because a partnership is considered to be an entity (even though composed of individuals) which requires treatment different from that accorded natural persons under the new Constitutional amendment?

"4. Is the personal property of a decedent's estate exempt from personal property tax if the heirs or legatees are individuals?

"5. Is the personal property of a decedent's estate exempt from personal property tax if the legatee is a corporation?

"6. Is the personal property held by an individual trustee exempt from taxation if the beneficiaries or beneficial owners are individuals? Is the answer different if the property is held by a corporate trustee?

"7. Is the personal property owned by tenants in common or joint tenants exempt from taxation?

"8. Is the personal property owned by a joint venture or other co-ownership exempt from taxation?

"Although the next assessment of personal property will be April 1, 1971, local assessing officials must soon begin to order the printing of forms for such assessment, and Supervisors of Assessment must be prepared to advise township assessors as required by Section 2 of the 'Revenue Act of 1939', (Chapter 120,

Paragraph 463, I.R.S.). We would, therefore, appreciate receiving your opinion at your earliest convenience."

As you have indicated in your letter, the amendment to the Illinois Constitution, approved by referendum on November 3, 1970, prohibits the taxation of personal property by valuation as to individuals. Your attention is called to Paragraph 499 of Chapter 120, 1969 Illinois Revised Statutes which states as follows:

"The property named in this section shall be assessed and taxed except so much thereof as may be, in this act, exempted:

"First: All real and personal property in this state.

"Second: All moneys, credits, bonds or stocks and other investments, the shares of stock of incorporated companies and associations, and all other personal property, including property in transitu to or from this state, used, held, owned or controlled by persons residing in this state, and all intangible personal property of foreign corporations, except those excluded by section 18 of this Act, doing business in this state which is located in this state and used in their business transacted within the state, provided that the provisions of this section relating to the taxation of intangible personal property shall not apply to those foreign corporations which are required by law to pay a premium tax for the privilege of doing business in this State.

"Third: The shares of capital stock of banks and banking companies doing business in this state.

"Fourth: The capital stock of companies and associations incorporated under the laws of this state."

It can be observed from the language of the foregoing Paragraph 499 that the personal property tax is a tax

upon the personal property itself. Paragraph 534 of Chapter 120 does, of course, set forth certain rules pertaining to the listing of personal property but these do not change the nature of the personal property tax which is a tax upon the personal property.

It therefore becomes necessary for us to determine the effect of the constitutional amendment which prohibits the taxation of personal property by valuation as to individuals. It would be unreasonable to believe that the language of the constitutional amendment could expressly include each and every conceivable situation. Necessary implications and intendments from the language used in a statute may be resorted to in order to ascertain the legislative intent. See *U.S. v. Jones*, 204 Fed. 2d 745 (certiorari denied 346 U.S. 354). In that case the court said at page 754:

"Necessary implication refers to a logical necessity; it means that no other interpretation is permitted by the words of the Acts construed; and so has been defined as an implication which results from so strong a probability of intention than an intention contrary to that imputed cannot be supported. 42 C.J.S., page 405 and cases there cited. The term is used where the intention with regard to the subject matter may not be manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances and the general language. *Buxford v. Kuesby*, 35 Cal. App. 2d 643, 96 P. 2d 380; *Goldfein v. Continental Ins. Co.*, 125 Neb. 112, 249 N.W. 78; 42 C.J.S., page 406. Consequently that which is implied in a statute is as much a part of it as that which is expressed, for a statutory grant of a power carries with it, by implication, everything necessary to carry out the power and make it effectual and complete. * * *

Furthermore, at page 100 of Volume 34 of Illinois Law and Practice is found the following statement:

"In construing a statute to give effect to the legislative intent and purpose, the court should, if possible, give it a reasonable, sensible, practical, and common-sense construction even though such construction qualifies the universality of its language."

As indicated above, the personal property tax is a tax upon the personal property itself. The only logical conclusion then as to the meaning of the constitutional amendment (Article IX-A) is that if the effect of the tax would be directly upon an individual (as distinguished, for example, from a corporation) then such personal property tax is abolished.

Article IX-A of the Illinois Constitution of 1870 became effective January 1, 1971 and is as follows:

"Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

Provision for the adoption of Article IX-A was made by Senate Joint Resolution No. 30 of the 76th General Assembly which reads as follows:

"RESOLVED, BY THE SENATE OF THE SEVENTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that there shall be submitted to the electors of the State for adoption or rejection at the next election of members of the General Assembly of the State of Illinois, in the manner provided by law, a proposition to add Article IX-A to the Constitution, the added Article to read as follows:

ARTICLE IX-A

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971."

Also pertinent is Senate Joint Resolution No. 67 which provides:

"RESOLVED, BY THE SENATE OF THE SEVENTY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that, in adopting Senate Joint Resolution No. 30, which submits to the electors of this State a constitutional amendment prohibiting the taxation of personal property by valuation as to individuals, it was the intention of this General Assembly to abolish the ad valorem taxation of personal property owned by a natural person or by two or more natural persons, and that, by the use of the phrase 'as to individuals,' this General Assembly intended to mean a natural person, or two or more natural persons as joint tenants or tenants in common."

Turning now to the questions which you have asked I shall discuss them in order. Your first question asks whether an individual proprietor is exempt from taxation on his business inventory and other personal property used in such business. Since the effect of such a tax would be upon an individual, I am of the opinion that the individual proprietor would be exempt. Similarly, the individual farmer is exempt in your second question.

Thirdly, you have inquired as to whether personal property of a partnership is exempt. A partnership is an association of two or more persons to carry on a business

for profit. The effect of the taxation of partnership property would be directly upon the individual partners and consequently I am of the opinion that such property is also exempt.

In your fourth and fifth questions you inquired about the taxability of personal property in a decedent's estate. The effect of taxation of personal property in an estate would be directly upon the heirs or legatees. Consequently, if the heirs or legatees are individuals such personal property is exempt, but if the legatee is a corporation then such personal property would be subject to tax.

In your sixth question you inquired whether personal property held by an individual trustee is exempt from taxation if the beneficiaries or beneficial owners are individuals. Since the effect of the tax would be directly upon an individual beneficiary, such personal property would be exempt. The fact that the trustee is a corporation or an individual would make no difference.

Seventh, you inquired whether personal property owned by tenants in common or joint tenants as individuals is exempt. For the reasons stated above, such personal property would also be exempt. Personal property owned by individuals in a joint venture or other co-ownership would also be exempt since the effect of the tax would be upon individuals.

Very truly yours,

ATTORNEY GENERAL.

APPENDIX C

December 28, 1970

S. A. Legal Opinion No. 1340

President George W. Dunne
537 County Building
Chicago, Illinois 60602

Dear President Dunne:

A question has arisen as to whether the recently adopted amendment to the 1870 Constitution of the State of Illinois applies to personal property held for the benefit of natural persons in trusts, estates, guardianships, and conservatorships.

On November 3, 1970, the voters of Illinois approved the following amendment to the revenue article of the 1870 Constitution of the State of Illinois:

"ARTICLE IX-A

"Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*"

The schedule for implementation of this amendment provides:

"This amendment shall be effective January 1, 1971."

Resolution of the question depends upon the intention of the General Assembly as to the word "individual" when it submitted this proposed amendment to the electorate. Chapter 7 $\frac{1}{2}$, Paragraph 2 of the Illinois Revised Statutes of 1969 provides:

"The General Assembly in submitting an amendment to the Constitution to the electorate shall pre-

pare a brief explanation of such amendment, a brief argument in favor of the same. . . . The minority of the General Assembly, if they so desire, may also prepare a brief argument against such amendment."

Pursuant to this statutory direction, the Seventy-Sixth General Assembly prepared such arguments. In the arguments in favor of the proposed amendment, there is no indication that the proposed amendment would not apply to personal property held for the benefit of natural persons in trusts, estates, guardianships, and conservatorships.

However, the arguments against the proposed amendments (which were corrected, with specific reference to this matter) contain the following language:

"That [personal property] which is owned by or held in a fiduciary capacity for the benefit of natural persons is exempted from taxes; that which is owned by corporations, etc., is subject to taxes."

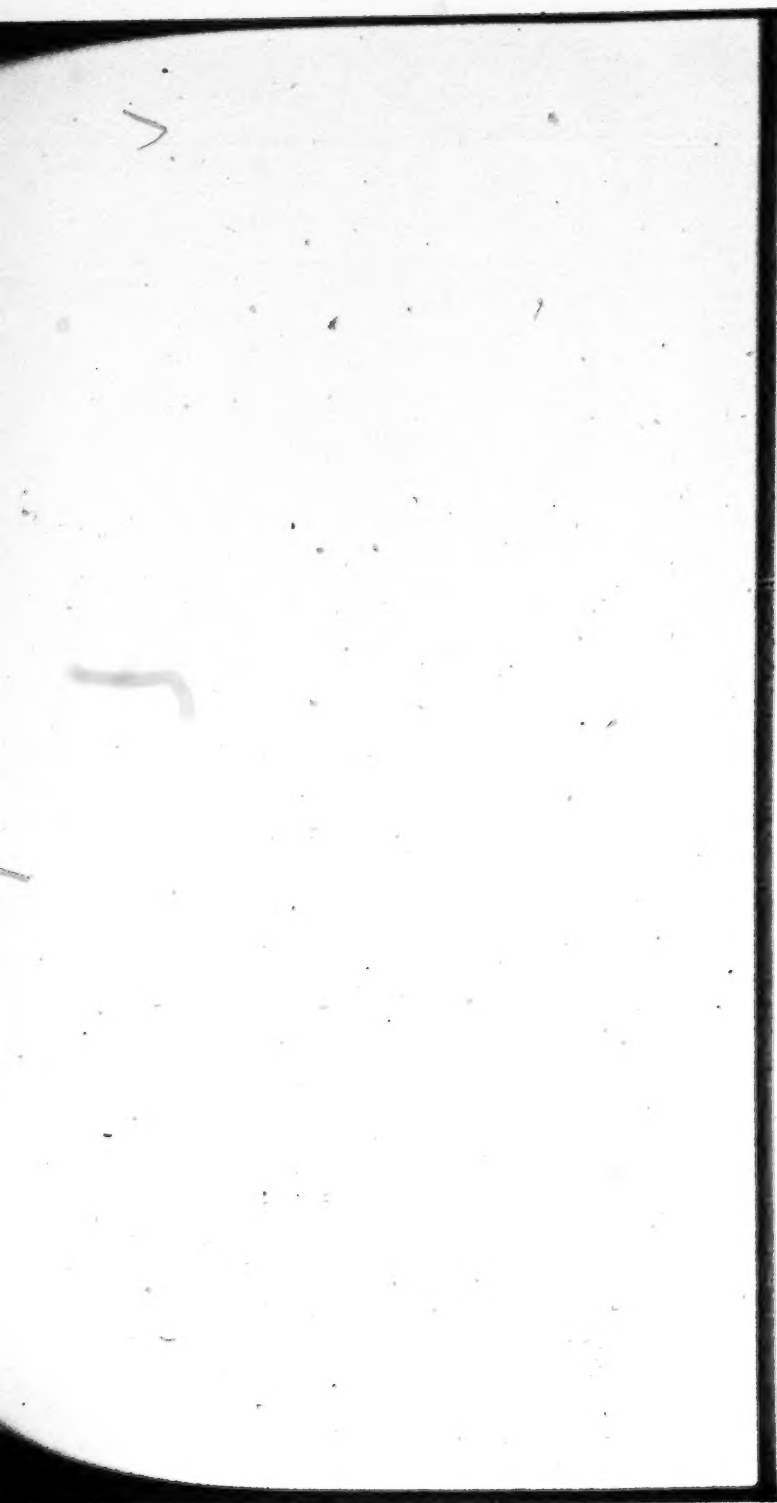
Thus, the clear import of this legislative explanation of the proposed amendment is that personal property held in a fiduciary capacity for the benefit of natural persons shall not be subject to the personal property tax.

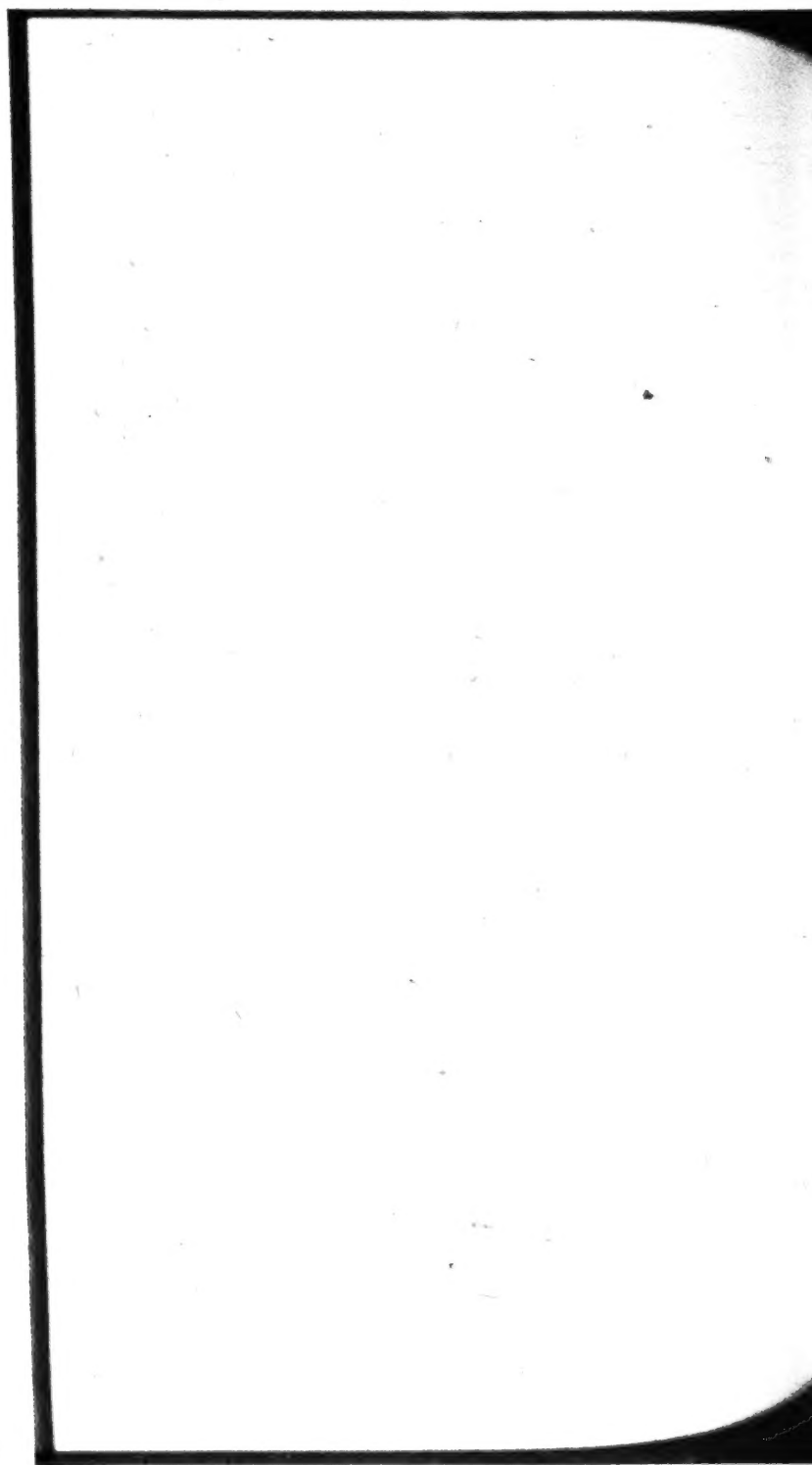
Therefore, it is my opinion that the recently adopted constitutional amendment prohibits taxation by valuation of personal property held for the benefit of natural persons in trusts, estates, guardianships, and conservatorships. (The provision of the Constitution, approved December 15, 1970, which prohibits reinstatement of any abolished ad valorem personal property tax, has no effect upon this opinion.)

Very truly yours,

EDWARD V. HANRAHAN,
State's Attorney of Cook County.

cc: P. J. Cullerton,
Cook County Assessor





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IN THE

Supreme Court of the United States

NOVEMBER TERM, A.D. 1971

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents,

and

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS CO., et al.,

Respondents.

**BRIEF FOR CORPORATION RESPONDENTS
M. WEIL AND SONS, INC., ET AL.**

This respondent is an Illinois corporations, and, in this proceeding, has been declared by Illinois' courts properly to have maintained its action not only as an individual corporation, but, as a representative of every corporation in the State of Illinois, and that each member of this class of corporate entities is adequately and competently represented herein. (App. 16.)

These respondents believe a more ready identification of the numerous parties before this Court may best be served if these respondents refer to themselves here as "Corporations."

Corporations understand that the petition for writ of certiorari filed by Cook County defendants stands as the "Brief" for those petitioners. Corporations agree with the "Constitutional Provisions Involved" and the "Statement of the Case" as set out therein (pages 5 through 17) and adopt the same as Corporations presentation here.

QUESTION PRESENTED FOR REVIEW

Whether a State constitutional amendment violates the equal protection clause of the 14th Amendment to the Constitution of the United States because it retains an *ad valorem* tax solely on the personal property of corporations while removing that tax from the personal property of all other persons and business entities; all of whom, prior to such amendment were members of the same class, and the personal property of each was subject by State Constitution to the levy of "a tax, by valuation, so that every person and corporation shall pay a tax in proportion of his, her, or its property . . ." (Ill. Const. (1870) Article IX, Section 1).

ARGUMENT**I.**

ARTICLE IX-A OF ILLINOIS CONSTITUTION OF 1870 OFFENDS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES UPON THE GROUNDS ASSIGNED IN, AND REASONS APPARENT FROM, THE OPINION ISSUED BY THE SUPREME COURT OF ILLINOIS.

Corporations adopt, and respectfully submit the opinion of the Supreme Court of Illinois, as their argument, and the judgment rendered by that Court as their position to this Court under this Point, as if that opinion and judgment were here set out in full. (App. 18-33).

The judgment of the Supreme Court of Illinois is correct. This Court should so hold.

II.

CORPORATIONS CONTEND THAT, IF ARTICLE IX-A OF THE 1870 CONSTITUTION OF THE STATE OF ILLINOIS EXCLUDES ONLY THE PROPERTY OWNED BY NATURAL PERSONS, BUT DENIES THAT SAME EXCLUSION TO CORPORATIONS, THEN SUCH CLASSIFICATION IS DISCRIMINATORY, UNREASONABLE AND DENIES DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAW GUARANTEED TO THEM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

As all laws in the State of Illinois must be obedient to Illinois' Constitution, so too, each of the Constitutions

of each of the 50 States of the Union is required to owe its allegiance to the Constitution of the United States.

It has long been held that State statutes relating to taxation must not violate the right under the Constitution of the United States to equal protection of the law. State constitutional clauses, equally with "statutes", must not be violative of, and may be reviewed in light of, confinements imposed by the Constitution of the United States. See *Railway Express Agency v. Virginia* (1931) 282 U.S. 440. The limitation imposed by the requirement of equal protection of the laws denies to government the right to tax businesses, with arbitrary discrimination.

Illumined by these precepts, Illinois' Constitution of 1870, emerges, and, as amended by Article IX-A, is discerned to have assumed the form hereinafter described.

Illinois' Constitution of 1870 compels the imposition of a tax by valuation of all property in this State, and compels payment of that tax by every owner of that property.

Article IX is the "Revenue" Article of that Constitution and encompasses *all* matters which relate to the revenue of the State of Illinois.

Section 1 of Article IX declares:

"The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that *every person and corporation shall pay* a tax in proportion to the value of *his her, or its* property . . ." (Emphasis supplied).

Section 1 of Article IX-A, effective January 1, 1971, declares:

"Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*"

It is clear that both of the above Articles pertain to and deal with an ad valorem property tax, and that Article IX-A purports to exclude from that tax only the property belonging to certain owners described therein as "individuals."

Were this intent and such objective to be attributed to Article IX-A, then corporations respectfully submit that Article IX-A offends the Fourteenth Amendment to the Constitution of the United States because it denies to corporations, and to other entities who may not be considered to be "individuals", the equal protection of the law guaranteed to them by that Amendment.

This is so because then, the classification attempted by Article IX-A creates a distinction between two classes, one of which classes invokes imposition of the tax, the other class being excluded from that tax, which classification, however, in no way whatsoever, is based on, is related to, or even refers to any differences in the property, or in the characteristics of the property, or in the form of the property, or any other distinguishments upon which such classification could find any support under the law.

Rather, Article IX-A ignores the identity of the property between these two classes, which **property** constitutes the **object** upon which the tax is imposed; and, instead, declares that one type of **ownership** of that property **will invoke** the tax while another type of **ownership** is **excluded** from paying that tax.

Corporations submit that, the mere recitation of such effect, if Article IX-A were to be construed as intending such result, readily demonstrates repugnance to the Fourteenth Amendment to the Constitution of the United

States because of the apparent denial to corporations of the equal protection of the laws.

Corporations respectfully submit that Article IX-A, properly and validly construed, excludes from taxation the personal property owned by corporations as well as that owned by all others in the State of Illinois. The Supreme court of Illinois erred in not so holding. This Court should so hold.

If this court is of the opinion that Article IX-A excludes only the property owned by all others, then that Article denies to corporations the equal protection of the law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States; the exclusion attempted in Article IX-A must fall, and the property owned by all others is equally taxable with that of corporations. The Supreme court of Illinois correctly so held. This Court should so hold.

III.

CORPORATIONS CONTEND THAT, UNLESS THE EXCLUSION OF PROPERTY OWNED BY "INDIVIDUALS" IS CONSTRUED TO EXCLUDE THE PROPERTY OF CORPORATIONS AS WELL AS THAT OF NATURAL PERSONS, THEN THE EMPLOYMENT IN ARTICLE IX-A, OF THE TERM "INDIVIDUALS" IS SO VAGUE, UNCERTAIN, AND INCAPABLE OF DEFINITIVE APPLICATION TO THE CONTEXT OF ARTICLE IX THAT ARTICLE IX-A MUST FALL BECAUSE IT IS TOTALLY ABSENT THE COMPREHENSION REQUIRED, ESPECIALLY OF CONSTITUTIONAL PROVISIONS.

Article IX of Illinois Constitution of 1870, exclusively provides for, and pertains to all of Illinois' revenue and taxation.

Section 1 of Article IX declares:

"The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that *every person and corporation* shall pay a tax in proportion to the value of his, her, or its property . . ." (Emphasis supplied).

Section 3 of Article IX declares:

"The property of the state, counties . . ., both real and personal, and such other property as may be used exclusively for *agricultural and horticultural societies for school, religious, cemetery, and charitable purposes*, may be exempted from taxation . . ." (Emphasis supplied).

Section 6 of Article IX declares:

"The general assembly shall have no power to release or discharge any county . . ., or the *inhabitants* thereof, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, nor shall commutation for such taxes be authorized in any form whatsoever." (Emphasis supplied).

Section 10 of Article IX declares:

"The general assembly shall not impose taxes upon municipal corporations, or the *inhabitants or property thereof* for corporate purposes, but shall require that all the taxable property . . . shall be taxed . . . such taxes to be *uniform* in respect to *persons* and property . . ." (Emphasis supplied).

The foregoing constitutes every section in Article IX which contains any word, term, or descriptive noun similar in descriptive sense to the designation employed in Article IX-A.

Article IX-A purports to prohibit the taxation of personal property by valuation as to *individuals*.

Nowhere in all of Article IX, which Article exclusively directs the imposition of taxes in Illinois, does the word "individuals" appear.

Indeed, Illinois Revenue Act of 1939 (Ill. Rev. Stats. 1971, ch. 120, sec. 482, *et seq.*), which imposes the property taxes directed by Article IX to be imposed, is significantly absent that designation or description in the entire list of definitions contained in the very first section of that Act (sec. 482, ch. 120). Especially apparent, and, equally significant, is the fact that the definition of "Persons-Persons" in paragraph (18) of section 482 of that Act extends only to "Male, female, corporation, company, firm, society, singular or plural number". Even there "*individuals*" is denied recognition as a designation for purposes of taxation.

Nowhere does Article IX direct the imposition of a tax by valuation on property owned by *individuals*.

Article IX-A purports to exclude from taxation a category, "*individuals*", which is unknown to the Revenue Article of the Constitution.

Equally significant is the complete absence of the category "*individuals*," from the Revenue Act of 1939, which Act imposes the tax made mandatory by Article IX.

Illinois' Constitution directs no tax to be levied on "*individuals*."

Illinois' Revenue Statute imposes no tax on "*individuals*."

Article IX-A seeks both to prohibit taxation, and to retain taxation **nowhere imposed**.

Corporations respectfully submit that, unless the exclusion of Article IX-A applies to them as well as all other "*individuals*," Article IX-A must fall because that amend-

ment to Article IX permits no delineation comprehensible to, and compatible with the language apparent in Article IX.

Article IX-A, equally as well, violates Article II, section 22 of Illinois' Constitution, and the Fourteenth Amendment to the Constitution of the United States because it denies to due process of law.

It has long been the law that statutes which either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application transcend due process of law. Illinois has long so held: *People ex rel. Duffy v. Hurley*, 1949, 402 Ill. 562; *Missouri Pac. R. Cd. v. Illinois Commerce Commission*, 1948, 401 Ill. 214; *Boshuizen v. Thompson & Taylor Co.*, 1935, 360 Ill. 195.

State constitutional clauses come within the same circumference of confinements imposed by the Constitution of the United States as do statutes. *Railway Express Agency v. Virginia*, 1931, 282 U. S. 440.

Corporations submit that the uncertainty of the designation "individuals", and the non-application of that term to the context of Article IX, and to the Revenue Act of 1939, is so manifest on its face, that such apparency requires no further demonstration.

Amending Article IX-A is incomprehensible. The term "individuals" found there, finds no counterpart, image, identity, or reflection, either in the Revenue Article (Article IX) of Illinois Constitution of 1870, or in Illinois Revenue Act of 1939. Absence of application demands its demise.

Article IX-A is constitutionally offensive. The judgment of the Illinois Supreme court is correct.

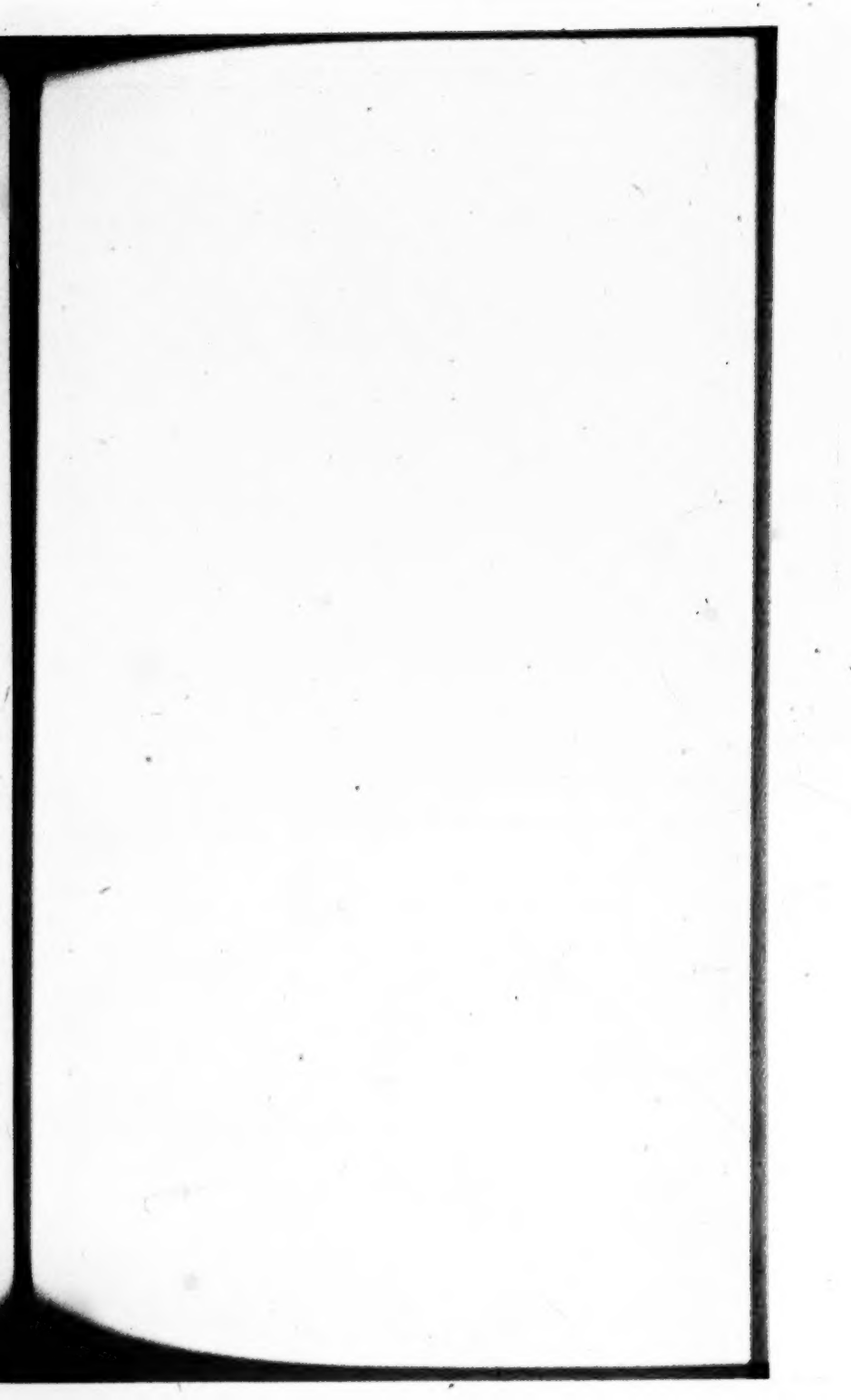
CONCLUSION

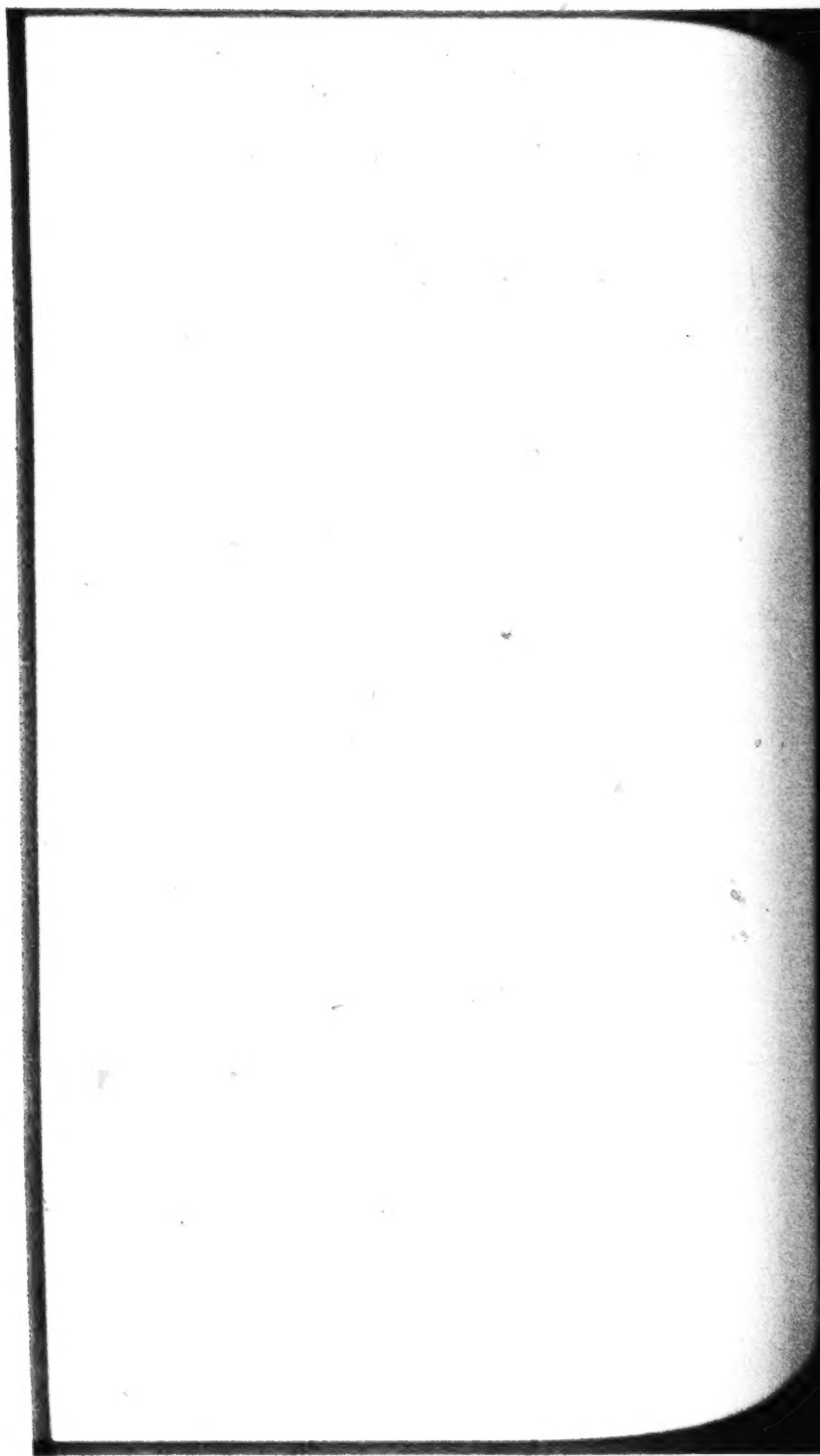
Corporations respectfully submit the correctness of the judgment, review of which is before this Court, and for the reasons and upon the grounds assigned here, as well as in the opinion issued by the court below, request this Court's affirmance of that court's judgment.

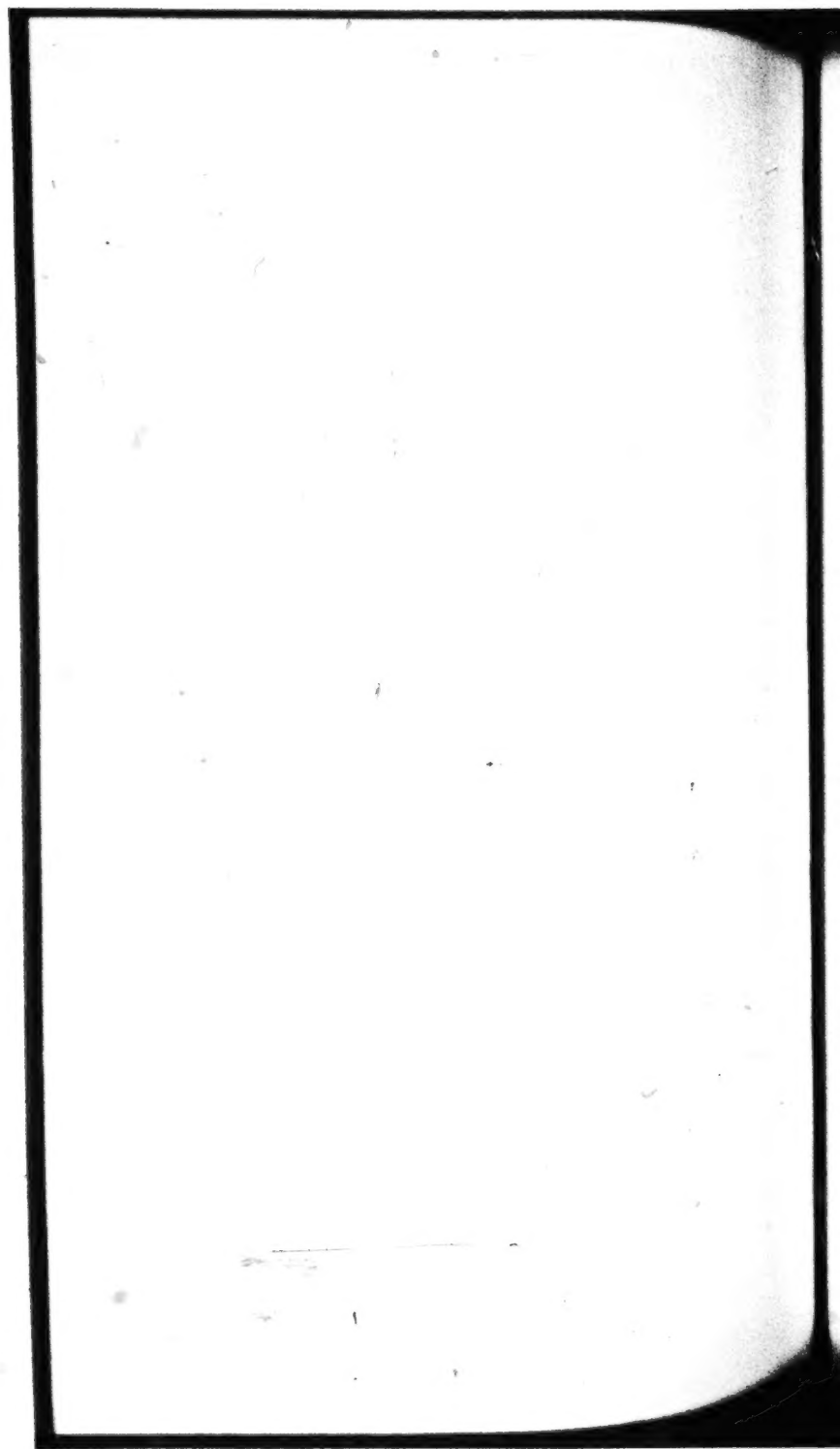
Respectfully submitted,

LOUIS L. BIRO,
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*Attorney for Corporation Respondents
M. Weil and Sons, Inc., et al.*







IN THE

Supreme Court of the United States

NOVEMBER TERM, A.D. 1971

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents,

and

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS CO., et al.,

Respondents.

BRIEF OF PROPRIETOR RESPONDENTS
JEROME S. HERMAN, d/b/a THE SPOT, AND
GUY S. ROSS AND EUGENE R. ROSS, d/b/a
GUY S. ROSS & CO.

This brief is filed in response to the briefs of petitioners Edward V. Hanrahan, State's Attorney of Cook County for Edward J. Barrett, County Clerk, et al., in the *Shapiro* case (No. 71-691) and William J. Scott, Attorney General of Illinois, attorney for Robert J. Lehnhausen, petitioner in No. 71-685, and to other "natural person" and corporate respondents who have taken positions adverse to the present proprietor respondents.

These respondents are Jerome Herman, an individual proprietor in Cook County, Illinois, doing business as The Spot, and a business partnership consisting of Guy S. Ross and Eugene D. Ross, d/b/a Guy S. Ross & Co., collectively called proprietors. Proprietors filed their complaint in the Circuit Court of Cook County as a class action for all similarly situated non-corporate businesses in Illinois, were declared proper class representatives by that court, and have represented the class of proprietorships, partnerships, and all other non-corporate business entities throughout these proceedings. Proprietors did not oppose the petitions for writ of certiorari. Proprietors' position is identical to the dissent by Mr. Justice Davis to the majority opinion of the Illinois Supreme Court; to the Brief filed in this case by the Attorney General *after* review was granted by this court; and to the Brief filed by the Governor of the State of Illinois as *amicus curiae*.

QUESTION PRESENTED FOR REVIEW

The question for review is:

"Whether a state constitutional provisions which distinguishes between corporations and individuals for the purpose of imposing an *ad valorem* tax on personal property violates the equal protection and due process clauses of the Fourteenth Amendment."

ARGUMENT**I.****THE CLASSIFICATION RECOGNIZED IN ILLINOIS CONSTITUTIONAL AMENDMENT ARTICLE IX-A, AND OVERWHELMINGLY APPROVED BY THE VOTERS, DISTINGUISHING BETWEEN THE PROPERTY OF "INDIVIDUALS" AND THE PROPERTY OF CORPORATIONS IS CONSTITUTIONAL.**

Proprietors are in a unique position under the posture of this case:

1. They adopt the Opinion issued by Illinois' Attorney General (Amended Petition for *cert.* of Lehnhausen in No. 71-685, App. 41-47).

2. They adopt the arguments made by Illinois' Attorney General for petitioner Lehnhausen in Case No. 71-685.

3. They adopt the arguments of the Governor of the State of Illinois contained in his "Amicus Curiae Brief in Support of Petition for Writ of Certiorari to the Supreme Court of Illinois" in No. 71-685.

4. They adopt the dissent filed by Mr. Justice Davis of the Illinois Supreme Court. (App. 33-44).

Positions adverse to that of proprietors are those advanced by:

1. The State's Attorney of Cook County, representing Cook County officials, petitioners in *Barrett v. Shapiro*, No. 71-691, who contends that "individuals" as used in Article IX-A amending the Illinois Constitution of 1870, pertains only to "natural persons" holding personal property for the personal use and enjoyment of themselves and their families as opposed to owning such property for a business use.

2. Clemens K. Shapiro, representing a class of all "natural persons" in Illinois, and a respondent along with these respondents in No. 71-691, who presents essentially the same arguments as the Cook County officials and whose position purports, as well, continued taxation of all "individuals" owning business property along with taxation of corporations.

3. M. Weil and Sons, Inc., an Illinois corporation, representing a class of all corporations, also a respondent in No. 71-691; and Lake Shore Auto Parts Co., another corporation and respondent in No. 71-685 (having previously been denied leave to withdraw from this case), both contending that taxation of corporations alone violates the equal protection provision of the Fourteenth Amendment.

Article IX-A amending the Illinois Constitution of 1870 provides: "Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

The Illinois Supreme Court interpreted the word "individuals" in Article IX-A which amended the 1870 Constitution of the State of Illinois, to retain the tax solely on corporations while excluding that tax on all others. The Court then concluded that a tax upon corporations and not *individuals* excluded under Article IX-A "violates the equal protection clause of the fourteenth amendment."

The Illinois Supreme Court has declared the word "individuals" to include all "natural persons" regardless of whether the personal property owned by them is used by them for their own personal purposes, or employed for business uses. That Court rejected the construction asserted by Shapiro and Cook County officials to the contrary, and held:

"We conclude that the meaning of Article IX-A is that *ad valorem* taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited". *Lake Shore Auto Parts Co. v. Korzen*, 49 Ill. 2d 137, 148 (1971).

This Court is left with the sole issue—does the classification between "individuals" and corporations approved in Constitutional Amendment Article IX-A violate the equal protection clause of the Fourteenth Amendment? Is there a rational basis for the differentiation in an *ad valorem* personal property tax between individuals (proprietorships and other non-corporate business entities) and corporations owning the same property used for business purposes?

For the reasons discussed briefly below, and as is already apparent from the briefs and appendices already on file, the taxation of corporations alone—after a constitutional referendum approving Article IX-A was overwhelmingly passed by the citizens and taxpayers of Illinois—is constitutionally permissible.

States are permitted flexibility and a variety of approaches in devising reasonable schemes of state taxation. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-7 (1959). The equal protection clause of the Fourteenth Amendment is not violated so long as a rational distinction can be drawn under any state of facts reasonably found to sustain the classification. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

The corporate form of doing business is a creature of statute, and corporate status is conferred in Illinois as a matter of grace. With the privilege of incorporation are benefits and liabilities, and the individual owners of any business may select from these advantages and disad-

vantages if they wish to incorporate, or if a corporation once formed is to be retained or dissolved.

The taxes imposed upon corporations are often different in kind and in amount from the same tax placed on other businesses, and taxes on corporation are many times unique to those entities. In *Thorpe v. Mahin*, 43 Ill. 2d 36 (1969), the Illinois Supreme Court upheld the recent income tax passed in Illinois which created a higher rate of taxation for corporations than for individuals. As Mr. Justice Davis stated in his dissent here, the distinction in classification between corporations and individuals was recognized and upheld in *Thorpe*, and should be upheld here. (App. 42).

The rule of law stated in *Quaker City Cab Co. v. Penn.*, 277 U.S. 389 (1928), to the extent that corporations rely upon that decision, has been superceded, distinguished and eroded by more recent cases dealing with the schemes of state taxation. (See e.g. *White River Co. v. Arkansas*, 279 U.S. 692 (1929) and *Amicus Brief of Governor*, p. 6, *et seq.*). Under the test stated by Mr. Justice Brandeis in that case, the equal protection clause only requires the classifications to be reasonable.

In the present case, the state legally performs a permissible function by classifying corporations under one broad category for tax purposes, which includes taxation of corporate personal property, while removing from taxation by referendum of the people all taxation directly upon "individuals" in the state. The corporation, being unique, is distinguishable from all other persons who have previously been subject to the onerous personal property tax in Illinois. The selection of the corporate form of doing business is not irrevocable and the individual shareholders, directors and officers may dissolve their

corporation for any reason—whether it be the high federal income tax rates levied or some local taxation corporations wish to avoid.

In Mr. Justice Davis' dissenting opinion (App. 33-44), heavy reliance is placed on *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276 (1932) and on an examination of Illinois' new Constitution of 1970, the very existence of which was ignored by the majority of that court, and in which constitution taxation according to the character of the owner is permitted under Section 5 (a) thereof. (App. 40). We endorse that dissent and adopt its rationale here.

It would be redundant, and respondents deem it unnecessary to further expand upon the arguments advanced in the dissenting opinion and the briefs on file.

CONCLUSION

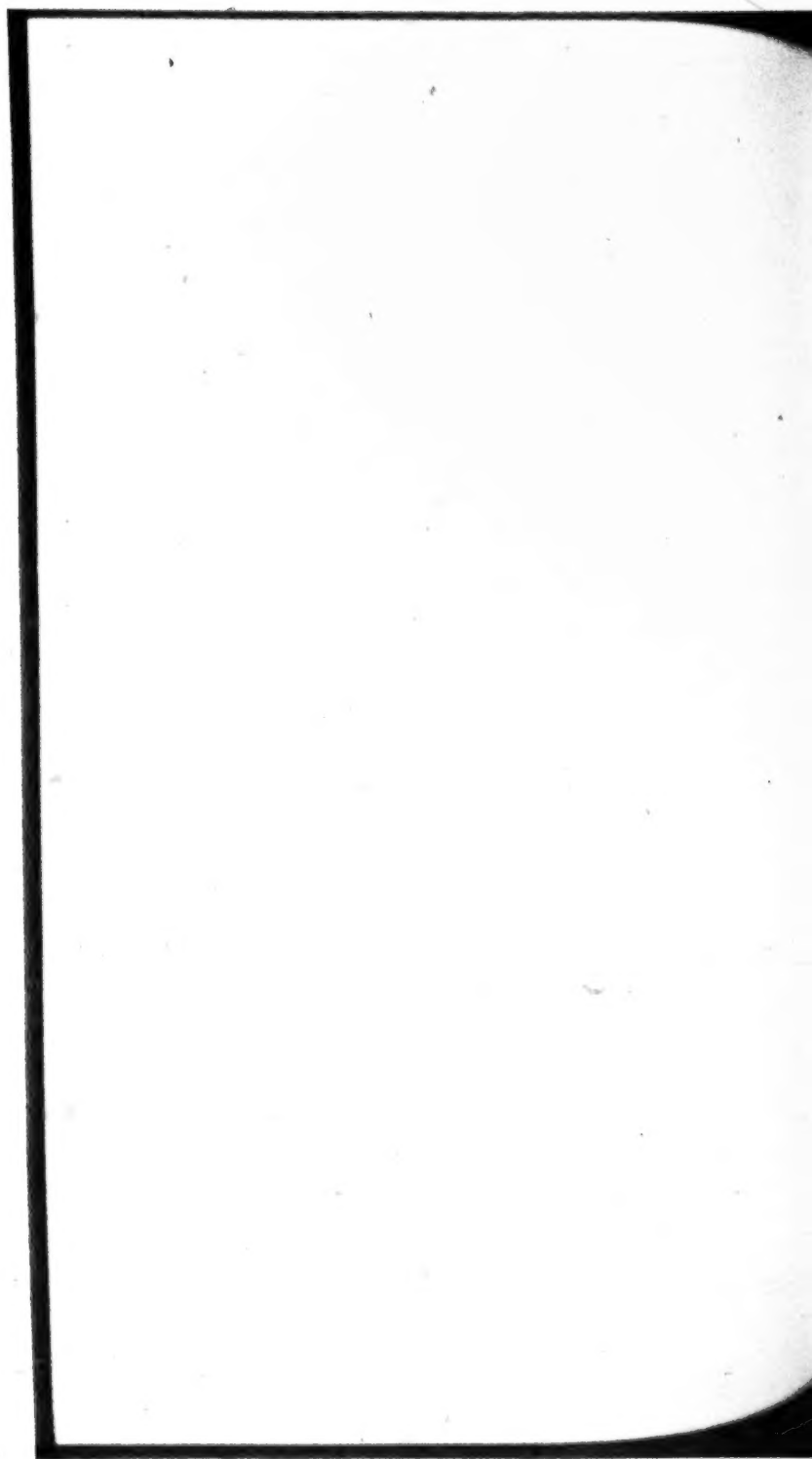
For all of the foregoing reasons, proprietor-respondents respectfully pray that this Court reverse the judgment of the Illinois Supreme Court with directions and hold that Article IX-A is constitutional and excludes from taxation the class of *individuals* represented here, which class consists of all non-corporate business entities in Illinois.

Respectfully submitted,

EDWARD A. BERMAN,
EUGENE T. SHERMAN,
Attorneys for Proprietor-Respondents,
Jerome Herman, et al.,

LEWIS W. SCHLIFKIN,
Attorney for Proprietor-Respondents,
Guy S. Ross, et al.





**In the
Supreme Court of the United States**

OCTOBER TERM, 1971

No. 71-685 and No. 71-691 — (Consolidated)

**ROBERT J. LEHNHAUSEN, Director of Department of Local
Government Affairs of the State of Illinois,**

Petitioner,

No. 71-685

vs.

LAKE SHORE AUTO PARTS CO., et al.,

Respondent.

**EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,**

Petitioners,

No. 71-691

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Illinois.

**OBJECTIONS TO MOTION FOR LEAVE TO FILE
A BRIEF AS AMICI CURIAE**

Respondents in *Shapiro v. Barrett*, No. 71-691, who are
Clemens K. Shapiro, Jerome Herman d/b/a The Spot,
Guy S. Ross and Eugene R. Ross d/b/a Guy S. Ross &

Co., and M. Weil and Sons, Inc., for themselves and on behalf of the classes of all natural persons, business proprietors, business partnerships and corporations, respectively represented by them, object to the motion of the American National Bank & Trust Company of Chicago, et al., members of the Corporate Fiduciaries Association of Illinois, for leave to file a brief as *amici curiae*, upon the following grounds:

These respondents have withheld consent to the filing of the *amici* brief for the reasons set forth below, and therefore Supreme Court Rule 42-3 is controlling in stating the grounds and requisites for an applicant's motion to file a brief as *amicus curiae*.

Under Supreme Court Rule 42-1, motions to appear as *amicus curiae* "are not favored". The present motion presents no facts compelling permission for the granting of the motion. For example, no facts or relevant arguments and materials not already presented, or which would not otherwise be submitted, are set forth. No reasons or facts are alleged to suggest that the applicants are not already adequately included and are not in fact included in the classes represented by respondents.

In addition, Clemens K. Shapiro represents the respondent class into which "natural person" beneficiaries of trusts fall. That representation has been found to be adequate, and it coincides and is synonymous with the position of the State's Attorney of Cook County in his brief for Edward J. Barrett, et al. To the extent that individual non-corporate business entities are beneficiaries of *amici's* trusts, the applicant's position is represented by Jerome Herman, et al. and by the Illinois Attorney General in their briefs, and by the Governor of the State of Illinois in his *amicus* brief. If *amici* are proceeding for corporate fiduciaries independent of the character of the beneficiaries

of their trusts, those corporations are included in the class represented by M. Weil and Sons, Inc. All matters posed by *amici* are already before the Court as the record and briefs on file amply indicate.

The original complaint in *Shapiro v. Barrett*, filed in the Circuit Court of Cook County, Illinois, contains the following description of those encompassed by the plaintiffs' (respondents here), representation in that case:

"Members of the classes represented before this Court are submitted by these plaintiffs to include, and are intended to include, all others affected by Amendment Article IX-A to Illinois Constitution of 1870, in regard to all that amendment; which others include but are not limited to non-citizens of this State; those authorized to do business in this State; and those required to list property as provided in Section 534 of Illinois Revenue Act of 1939. [ch. 120, Sec. 482, et. seq. Ill.Rev.Stat. 1969]" (Excerpts of Record in Illinois Supreme Court, p. 4)

No matter which definition of "individuals" under Article IX-A is ultimately sustained, all those conceivably encompassed within that term are before the Court.

The statute referred to, being Section 534 of the Illinois Revenue Act of 1939, includes trustees, conservators, guardians, executors and all other categories of individuals represented by the present plaintiffs. That statute is appended hereto as Appendix A.

A reading of the motion, including the Brief and Appendices, shows on its face that nothing is added by the applicants who have waited well over one year to petition to participate in these proceedings. The brief attached to the motion of *amici* is improperly filed since such briefs may only be filed after leave of court. (Rule 42-2). Present *amici* will additionally complicate already cumbersome

proceedings resulting from the granting of two Petitions for Certiorari, the denial of a third such Petition, and the existence of complete briefs on the merits, another respondent's brief to be filed and replies to these briefs.

WHEREFORE, respondents pray that the Motion for leave to file a brief as *amici curiae* of the members of the Corporate Fiduciaries Association of Illinois be denied.

Respectfully submitted,

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Respondents in Barrett v. Shapiro.

Dated: June 23, 1972

APPENDIX

APPENDIX

APPENDIX "A"

(Chapter 120, Sec. 534, Illinois Revised Statutes)

§ 534. *Who lists personal property*

Personal property shall be listed in the following manner:

(1) Every person of full age and sound mind, being a resident of this State, shall list all his moneys, credits, bonds or stocks, shares of stock of joint-stock or other companies (when the capital stock of such company is not assessed in this State), moneys loaned or invested, annuities, franchises, royalties and other personal property.

(2) He shall also list all moneys and other personal property invested, loaned or otherwise controlled by him as the agent or attorney, or on account of any other person or persons, company or corporation whatsoever, and all moneys deposited, subject to his order, check or draft, and credits due from or owing by any person or persons, body corporate or politic.

(3) The property of a minor child shall be listed by his guardian; if he have no guardian, then by the father, if living; if not, by the mother, if living; and if neither father nor mother be living, by the person having such property in charge.

(4) The property of an idiot or lunatic, by his conservator; or if he has no conservator, by the person having charge of such property.

(5) The property of a person for whose benefit it is held in trust, by the trustee; of the estate of a deceased person, by the executor or administrator.

App. 2

(6) The property of corporations whose assets are in the hands of receivers, by such receivers.

(7) The property of a body politic or corporate, by the president, or proper agent or officer thereof.

(8) The property of a firm or company, by a partner or agent thereof.

(9) The property of manufacturers and others in the hands of an agent, by and in the name of such agent, as merchandise.

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In the

Supreme Court of the United States

OCTOBER TERM A. D. 1971

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondents.

No. 71-691

EDWARD J. BARRETT,

County Clerk of Cook County, Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

**On Writ Of Certiorari To The
Supreme Court Of Illinois**

**MOTION FOR LEAVE TO FILE A BRIEF AND
ORALLY ARGUE AS AMICI CURIAE &
BRIEF OF AMICI CURIAE**

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Proviso Township High School District #209, et al.



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM A. D. 1971

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondents.

No. 71-691

EDWARD J. BARRETT,

County Clerk of Cook County, Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of Illinois

**MOTION FOR LEAVE TO FILE A BRIEF
AND ORALLY ARGUE AS AMICI CURIAE**

Proviso Township High School District # 209, Cicero
Grade School District # 99, Bellwood Grade School Dis-
trict # 88, and River Grove Grade School District #85½,
by their attorneys, Ancel, Glink, Diamond & Murphy
and Witwer, Moran & Burlage, move for leave to file a

Brief and Orally Argue as Amici Curiae in the above-entitled cases, the consent of the attorneys for the petitioners and respondents not having been obtained, and in support thereof state as follows:

1. In a substantial sense, these applicants were the prevailing parties in the proceedings in the Illinois Supreme Court (there described, in Docket No. 44308, as the *Maynard* petitioners). Eugene L. Maynard is not an applicant for amicus standing since the class of individual taxpayers is represented by other parties to this litigation.

2. These applicants are all school districts within Cook County, Illinois, which receive substantial revenue from the proceeds of the Illinois personal property tax.

3. These parties first became interested in the cases at bar when on March 30, 1970, the respondent Lake Shore Auto Parts Co., procured a judgment from Judge Walter P. Dahl of the Circuit Court of Cook County which had the effect of abolishing all Illinois personal property taxes. That decision found that the newly adopted Article IX-A of the Illinois Constitution which abolished personal property tax for "individuals" had amended a provision of the Illinois revenue statutes. The trial court held that the revenue statute once amended was unconstitutional since it imposed a property tax on corporations and excluded individuals. The trial court thus held Article IX-A to be constitutional, the Revenue Act provision unconstitutional, and all personal property taxation to be ended.

Had that trial court decision been upheld, it would have resulted in an immediate loss in yearly tax revenue of \$1,752,231.00 for applicant Proviso, \$1,203,169.00 for ap-

plicant Cicero, and lesser but substantial amounts by Bellwood and River Grove, all as part of a statewide loss in yearly revenue for school districts, municipalities, counties, and other public bodies of over \$250,000,000.00.

4. These applicants were unable to negotiate employment contracts, make purchases of needed supplies, construct buildings or prepare budgets and financial projections in the uncertain situation caused by the trial court decision in *Lake Shore*. In addition, the applicants believed that the judgment order entered by Judge Dahl was erroneous. Therefore, these applicants along with an individual taxpayer, Eugene L. Maynard, requested leave to file an original action in the Illinois Supreme Court. The petition in the Illinois Supreme Court alleged, among other things, that the parties in the *Lake Shore* case would not present all necessary arguments to the Court. While *Lake Shore Auto Parts* argued that a portion of the Revenue Act (Ill. Rev. Stat. 1969, Ch. 120, Secs. 482, et seq.) was unconstitutional, these applicants sought to enter the case to argue the unconstitutionality of Article IX-A itself. The Illinois Supreme Court (which already had the *Lake Shore* case before it on appeal) allowed these applicants leave to file their action under the Court's powers to grant original jurisdiction. That original action and the *Lake Shore* case were consolidated.

5. After these applicants were granted leave to file their original action in the Illinois Supreme Court, a case was hurriedly brought, in the same Circuit Court of Cook County (but before another judge thereof), by a group of parties, all but one of whom had previously been refused the right to file such an original action. Those parties were Clemens K. Shapiro, a natural person; Jerome Herman, doing business as "The Spot", representing in-

dividuals engaged in business; Guy S. Ross and Eugene D. Ross, doing business as "Guy S. Ross & Co.", representing individuals engaged in business as partners; and W. Weil & Sons, Inc., representing corporations. After a highly expedited trial and appeal, their case was consolidated with the other two cases, and all three cases were argued together with a single opinion being written.

6. Among all of the parties before the Illinois Supreme Court, these applicants were the only parties to seriously argue that Article IX-A was unconstitutional on equal protection grounds. Such was the exact judgment reached by the Illinois Supreme Court. After having made the declaration of unconstitutionality of Article IX-A, in accordance with the prayer of the *Maynard* petitioners, the court proceeded to not only dismiss the *Maynard* original petition but also mandated dismissal of the *Lake Shore* and *Shapiro* cases by the lower courts. From that judgment these applicants, having prevailed, did not appeal. Since the state and county officials who were defendants in the Illinois Supreme Court chose the *Lake Shore* and *Shapiro* cases—rather than the *Maynard* case—as their vehicles for seeking certiorari jurisdiction, questions arose whether applicants were clearly entitled to the status of "respondents" in this Court. Anxious to protect our victory and desirous of clarifying the point, we, on May 5, 1972, filed a motion requesting recognition as parties to the certiorari proceeding. This Court denied that motion without prejudice to our rights to request amici standing.

7. An analysis of the position of the parties now before this Court and an examination of the briefs already filed will quickly show that these applicants, as amici curiae, will be the only parties effectively urging affirmation of the Illinois Supreme Court decision.

(a) The Illinois Attorney General and the State's Attorney of Cook County, representing state and county tax officials, are both in this case since it is their responsibility to attempt to uphold the validity of Article IX-A. Generally, such officials would be representing the applicant public bodies who are in danger of losing established tax revenues. In this case, however, the argument of such public bodies will only be before the Court by way of this amici brief, which will show the illegal and adverse practical effects of reversing the Illinois Supreme Court decision.

(b) Lake Shore Auto Parts Co. is the respondent in case No. 71-685. Lake Shore is a small auto parts company which sought in this case to represent all corporations. In the trial court, Lake Shore succeeded, by an unusual argument, in procuring an order which would have abolished all personal property taxes on corporations and everyone else as well. The Illinois Supreme Court rejected that argument and overruled Lake Shore's trial court victory. Lake Shore attempted to review that decision in this Court but its petition for writ of certiorari was denied. At that point, the interest of Lake Shore waned. Lake Shore, by its attorney, then asked to withdraw from this litigation. Such request was denied. We are informed that Lake Shore will file a brief in this case. Such brief, in spite of the denial of certiorari, will argue points rejected by both the Illinois Supreme Court in its opinion and this Court in its denial of certiorari to Lake Shore. Lake Shore, though nominally a respondent, will ask that the Illinois Supreme Court be reversed. It is therefore obvious that said respondent may not be viewed as an advocate for the affirmance of the Illinois Supreme Court decision.

(c) Clemens K. Shapiro, Jerome Herman, Guy S. Ross and Eugene D. Ross are among the respondents in Case No. 71-691. The briefs of these parties have

already been submitted to the Court. While each of these parties is designated a "respondent" and might be expected to support the position taken by the Illinois Supreme Court, their briefs take an opposite position. Each of these respondents requests that the judgment of the Illinois Supreme Court be reversed. The interest of these parties is that of natural persons who own personal property either for their own enjoyment or for business usage. Such parties can only oppose the position taken by the Illinois Supreme Court. It is obvious both from their position and their briefs that the Court will receive from them no argument adverse to that of the Attorney General or State's Attorney.

(d) The only other "party" in the case is M. Weil & Sons, Inc. The brief of M. Weil & Sons, Inc. contains a statement that they will adequately and competently represent "every corporation in the State of Illinois" (Respondent's Brief—page 2). An examination of the Weil brief, however, indicates otherwise. The first argument heading put forward by the corporation is to "adopt and respectfully submit" the opinion of the Supreme Court of Illinois. No discussion of that opinion is given. The second argument heading is a discussion comprising three pages without pertinent citation of the central issue in this litigation. The third argument heading in the brief (set out over 3½ pages) is that Article IX-A of the 1870 Constitution is too vague to stand as a provision of basic Illinois law. With all due respect to M. Weil & Sons, Inc., the contents of its brief hardly represents an adequate defense of itself let alone the opinion of the Illinois Supreme Court.

(e) In view of the foregoing, we believe that it is fair to characterize the *Shapiro* case as a "friendly" suit with all parties thereto being "friendly" participants not true adversaries.

8. The only parties with any interest in the affirmance of the Illinois Supreme Court decision are these applicants who seek amici status and who were substantially the prevailing parties therein. That these applicants have no quarrel with a properly drafted statutory or constitutional exemption of personal property taxation is shown in our brief which discusses a very recent Illinois legislative development to that effect. On behalf of the citizens of our districts, however, we believe that we do have a responsibility to resist the unconstitutional removal of a large portion of the tax base of public bodies within the State of Illinois by what we and the Illinois Supreme Court view to be unconstitutional means.

9. If these applicants are granted amici status, they will argue in their brief and in their oral presentation that the issues which this case raises involve all public bodies throughout the United States and the continued validity of equal protection guarantees for all corporations throughout the country. These issues are of enormous importance and ought not to be presented before this Court in anything less than a full adversary presentation.

10. For the reasons set out in this motion, regarding the non-adversary status of the parties now before the Court and the lack of any party to argue for the affirmance of the Illinois Supreme Court decision, these applicants ask that in addition to the privilege of filing a brief that they be allowed to orally argue. We respectfully urge that the presence during oral argument of counsel for these amici among whom are the President of the 1970 Illinois Constitutional Convention and lawyers who are

knowledgeable in Illinois municipal and school law, will be in aid of the Court.

Respectfully submitted,

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BRIEF OF AMICI CURIAE

2. 1914-1915

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**On Writ Of Certiorari To The
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INTRODUCTION

Proviso Township High School District # 209, Cicero Grade School District # 99, Bellwood Grade School District # 88, and River Grove Grade School District # 85½ are all public bodies within the State of Illinois assigned the task of the education of the school children within their districts. These parties have been involved in the issues at bar since May 12, 1971, when the Illinois Supreme Court granted their motion for leave to file a

complaint in that court as an original action arguing, among other things, the constitutional invalidity of Article IX-A of the Illinois Constitution. It has been the position of these parties since that time that Article IX-A, added by amendment to the Illinois Constitution of 1870 (at the General Election of November 3, 1970), violated the equal protection clause of the 14th Amendment of the United States Constitution in that it attempted to require the paying of personal property taxes by corporations while freeing all other taxpayers from that burden.

These amici appeared in the Illinois Supreme Court in a representative capacity on behalf of all public bodies within the State which receive the proceeds of the Illinois personal property tax. Each of the school districts appearing here as amici receive substantial revenues from personal property taxes—amounting in the case of two amici to over one million dollars per year. In the Illinois Supreme Court these amici argued in the alternative. We first argued that if the exemption of personal property taxes “as to individuals” could be interpreted to exempt only the non-business property of natural persons, then such a classification would be valid under the 14th Amendment. Such a distinction would not be based upon the ownership of the property but upon its use. The Illinois Supreme Court rejected that argument stating that the clear meaning of the language of Article IX-A was to exempt from the tax all persons but corporate persons. Our alternative argument in the Illinois Supreme Court was that if such an interpretation was compelled, then the Court had no choice but to find Article IX-A an unconstitutional discrimination against corporations on equal protection grounds. As has been pointed out in our motion for leave to file this brief, these amici were *the only parties* to aggressively make that contention in the Illi-

nois Supreme Court. The Court accepted that argument. In our motion for leave to file this brief (under this same cover), we explain the rather unusual circumstances which have resulted in our appearing in this cause as amici rather than as respondents. These parties, in their representative capacity, on behalf of all public bodies in the State, felt compelled to bring this original action and to follow the litigation on behalf of their class in order to resist the withdrawal of all personal property tax revenue, as was the trial court finding in *Lake Shore*, or substantial portions of personal property tax revenue, as was the trial court finding in *Shapiro*. These amici and the class they represent are not opposed to tax reform but are opposed to such reform when brought about by constitutional amendments which violate the equal protection clause and trial court decisions which erroneously interpret long-standing case law. Having been granted the status of amici by this Court, we shall, therefore, proceed to argue that the decision, procured through our labors, in the Illinois Supreme Court should be affirmed.

OPINION BELOW

The opinion and dissent thereto of the Supreme Court of the State of Illinois are reported in 49 Ill. 2d 137 and 273 N.E. 2d 592.

JURISDICTION

The jurisdiction of this Court is invoked to review a final judgment of the Supreme Court of Illinois pursuant to Title 28 U.S.C. § 1257 (3). The decision of the court below was rendered on July 9, 1971. A petition for rehearing was denied on August 24, 1971. The petitions for writ of certiorari were granted April 3, 1972.

CONSTITUTIONAL PROVISION

Article IX-A of the Constitution of the State of Illinois of 1870, as amended, and approved, provides:

"Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

QUESTION PRESENTED

Whether a State Constitutional provision which distinguishes between corporations and natural persons for purposes of imposing an ad valorem tax on personal property, *a distinction based solely on ownership by one as a corporate person and the other as a natural person*, violates the equal protection clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

The Illinois Constitution of 1870, Article IX, §1, required the Illinois General Assembly to levy ad valorem taxes so that "every person and corporation shall pay a tax *in proportion to the value* of his, her or its property." (Emphasis added.) This mandate had been implemented by a comprehensive Revenue Act which applied to all property and to all taxpayers, with typical statutory exemptions, e.g. charitable, religious. Revenue Act of 1939, §1 et seq., Ill. Rev. Stat. ch. 120, §482 et seq.

The Illinois General Assembly, by Senate Joint Resolution 30, adopted June 30, 1969, submitted a proposition for referendum vote at the November, 1970 general election, to adopt Article IX-A of the 1870 Constitution. If adopted, Article IX-A purported to abolish the ad valorem personal property tax, but only on property owned by individuals. It received an overwhelming majority vote.

Various parties, including amici curiae, utilizing different Illinois courts and presenting a variety of arguments, presented the Fourteenth Amendment question, stated *supra*, in the Illinois Supreme Court. That Court declared Article IX-A as construed by it to be unconstitutional under the equal protection clause of the Fourteenth Amendment. *Lake Shore Auto Parts Co. v. Korzen*, 49 Ill. 2d 137, 273 N.E. 2d 592 (1971).

Several parties thereafter petitioned herein for writ of certiorari seeking review of that decision. This Court on April 3, 1972, granted two of those petitions and consolidated the cases. *Lehnhausen v. Lake Shore Auto Parts Co.*, No. 71-685; *Barrett v. Shapiro*, No. 71-691.

SUMMARY OF ARGUMENT

1. The issue is very narrowly limited both by concession of the parties and by the decision of the Illinois Supreme Court. That decision is viewed by this Court as binding here in determining the construction of Article IX-A of the 1870 Illinois Constitution, being an authoritative determination by the highest court of the State of Illinois.

2. That authoritative construction discloses that: (a) Article IX-A classifies personal property for ad valorem taxation without regard to the characteristics or use of the property, but solely on ownership; (b) the proposed classification promotes no policy other than a desire to free one set of property owners, *i.e.* natural persons, from the burden of a tax imposed upon another set, *i.e.*, corporations; and (c) under Illinois law, ownership for purposes of ad valorem property taxation is a neutral consideration.

3. Accordingly, such an arbitrary classification as Article IX-A purported to establish violated the equal protection clause of the Fourteenth Amendment, as interpreted for almost a century in a long line of federal and state court decisions. Petitioners' efforts to distinguish these cases totally fail, since the cases they rely on as 'superseding' or 'undermining' this long-established doctrine did not involve ad valorem property taxes *in situations where the only ground of discriminatory classifications against corporations was ownership per se.*

4. Since the Illinois personal property tax, as affected by Article IX-A, cannot conceivably be viewed as an excise, income, occupation or franchise tax, or as a special property classification based on use, there can be no reversal of the Illinois Supreme Court, absent a showing of a valid public policy justifying or advanced by this discrimination against corporations. Petitioners wholly fail to present any valid policy.

5. The legislative history of Article IX-A and of the 1970 Illinois Constitution, including the deliberations of the Sixth Illinois Constitutional Convention, neither afford any public policy justification for the discrimination, nor cure the unconstitutional defect implicit in Article IX-A.

6. Adoption of the arguments of plaintiff below in the *Lake Shore Auto Parts Co.* case would violate basic principles of constitutional interpretation and would cause financial chaos for many public bodies.

7. Failure to sustain the decision of the Illinois Supreme Court would constitute a rejection of a time-honored interpretation of the equal protection clause. It in effect would end equal protection of the laws as to corporate persons. The consequences of such a decision would have incalculable, adverse legal, social and economic impact.

ARGUMENT

I.

DISCRIMINATION BETWEEN CORPORATIONS AND NATURAL PERSONS IN AD VALOREM PERSONAL PROPERTY TAXATION, BASED SOLELY ON OWNERSHIP IDENTIFICATION, CONSTITUTES A PATENT VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In parts I and II of our amici brief we deal principally with the arguments and contentions of the Illinois Attorney General contained in his Brief of Petitioner on Writ of Certiorari granted in Docket No. 71-685. References in these sections are to that brief and accompanying appendix.

Unlike the several issues stressed in his petition for a writ of certiorari, the Illinois Attorney General now properly narrows the issue of this case. He states in his brief (p. 2) that the Question Presented For Review is as follows:

"Whether a State Constitutional provision which distinguishes between corporations and natural persons for the purposes of imposing an ad valorem tax on personal property violates the equal protection clause of the fourteenth amendment?"

With but one qualification we accept that statement. We would rephrase the question at issue as follows:

"Whether a State Constitutional provision which distinguishes between corporations and natural persons for purposes of imposing an ad valorem tax on personal property, *a distinction based solely on ownership by one as a corporate person and the other as a*

natural person, violates the equal protection clause of the fourteenth amendment."

In this narrow frame of reference it becomes important at the outset to review the findings and conclusions of the Illinois Supreme Court in its opinion in *Lake Shore Auto Parts Co. v. Korzen*, 49 Ill. 2nd 137, 273 N.E. 2nd 592 (1971), supporting its construction of Article IX-A of the Illinois Constitution of 1870. The Illinois Attorney General correctly concedes that that court's "interpretation of the meaning of Article IX-A is controlling for the purpose of determining the issue raised here." See Brief, p. 9. It is equally clear that the construction by the Illinois Supreme Court which is binding here embraces not only the meaning of the particular words of Article IX-A but also the Illinois Supreme Court's consideration of legislative history, relevant contemporaneous events, questions of state policy and other interpretative factors reflected in its opinion. In a long line of cases based on principles of federalism, this court has held that it will be bound by authoritative construction by the highest state court of a state constitutional or statutory provision. See *Fairfield v. County of Gallatin*, 100 U.S. 47, 50-52 (1879); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 285 (1961); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 99 (1952); *Winters v. New York*, 333 U.S. 507, 514 (1948); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 613 (1937); *Hebert v. Louisiana*, 272 U.S. 312, 316-317 (1926); *First National Bank of Garnett v. Ayers*, 160 U.S. 660, 664-665 (1896); *Polk's Estate v. Wendall*, 13 U.S. 87, 98 (1815) (Marshall, C.J.).

Salient parts of the opinion of the Illinois Supreme Court written by Mr. Justice Walter V. Schaefer which

conclusively support our definition of the issue are as follows:

(a) "We have examined the other materials* to which the Maynard and Shapiro plaintiffs have referred, but have found nothing which persuades us that the words of article IX-A should be given anything other than their natural meaning". (App. p. 28)

(b) "We conclude that the meaning of article IX-A is that *ad valorem* taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited". (App. p. 28)

(c) "The new article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed". (App. p. 29)

(d) "It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others". (App. pp. 31-32)

* The reference here is to comprehensive materials and arguments involving legislative history, administrative interpretations, contemporaneous developments and other interpretative factors which these amici, as Maynard plaintiffs below, alternately argued and which Shapiro plaintiffs also presented to show that the words "as to individuals" should be construed so as to establish classifications based on the nature and use of personal property.

(e) "For the purpose of a tax by valuation upon the ownership of real or personal property, the identity of the owner is a neutral consideration, as is his status as sole proprietor, joint tenant, tenant in common, partner (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 25), limited partnership (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 61), member of a professional service corporation (Ill. Rev. Stat. 1969, ch. 32, par. 415-1 et seq.), or of a professional association (Ill. Rev. Stat. 1969, ch. 106 $\frac{1}{2}$, par. 101 et seq.; see Sup. Ct. Rule 721, Ill. Rev. Stat. 1969, ch. 110A, § 721; 43 Ill. 2d R. 721)." (App. p. 32)

The foregoing determinations are definitive and final in the review of this case. Petitioners do not argue, nor could they reasonably argue that this Court should now reverse its long established rule giving conclusive effect to construction of a state's constitution and statutes by its highest court. Thus review of the decision in *Lake Shore Auto Parts Co. v. Korzen*, 49 Ill.2d 137, 273 N.E. 2d 592 (1971) should proceed on the accepted premises (a) that the Illinois tax is sought to be imposed on corporate persons solely by reason of the fact that they are corporate persons and that natural persons are sought to be exempted solely because they are natural persons; (b) that the classification does not depend on any characteristics of property sought to be taxed or upon the use to which the property is put; also (c) that no reasonable and substantial state policy exists which was sought to be served by the discriminatory method of taxation provided in Article IX-A.

The Illinois Supreme Court adopting these premises as controlling held that the resultant discrimination against corporate entities violated the equal protection clause of the Fourteenth Amendment. In light of the settled legal principles hereinafter set forth governing the interaction

of a state's power to tax and the limitations imposed thereon by the Fourteenth Amendment, the decision of the Illinois court is clearly correct and must be affirmed.

Though the decisions of this Court have indicated that the goals of the Fourteenth Amendment are "substantial equality and fair equivalence" in the imposition of tax burdens, *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 547 (1934); 16 C.J.S. Constitutional Law §520, the states have never been bound by hard and fast rules. Precise equality in all situations is not required and states may, under proper circumstances, classify persons, property and occupations, subjecting different classes to dissimilar tax treatment.

Despite this broad latitude, the equal protection clause serves to insulate corporations as well as natural persons from arbitrary and unreasonable tax treatment by the states. *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Pembina Consolidated Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888). The parameters of the amendment's restraint on the states' ability to classify for taxing purposes have been restated by this Court on numerous occasions. Thus in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), this Court said pp. 526, 527:

"Of course, the States, in exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition,

use or value. *Bell's Gap. R. Co. v. Pennsylvania*, 134 U.S. 232, 237; *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 293; * * * *State Board of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 537. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co. v. Conway*, supra, 281 U.S., at 159.

"But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of legislation.' *Royster Guano Co. v. Virginia*, 253 U.S. 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 37; *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger v. Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 160 * * *." (Emphasis supplied)

One of the most comprehensive summations of the pertinent equal protection considerations, emphasizing the necessity of rationality and fairness in classification, is that of Mr. Justice Brandeis, dissenting in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406 (1928):

In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of

the State; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible. (Emphasis supplied.)

We believe that this court in reviewing the decision of Mr. Justice Walter V. Schaefer of the Illinois Supreme Court will agree that the classification attempted in Article IX-A does not rest 'upon a difference which is real' nor is it supported by a policy which is within the permissible functions of the State. On the contrary we believe this Court will find the arguments put forward to support the discrimination against corporate persons to be 'specious' and 'fanciful'.

In our considered judgment reversal of the decision of the Illinois Supreme Court herein as sought by petitioner would directly necessitate abandonment by this Court of a doctrine which has been settled for nearly ninety years and consistently relied on by lower Federal courts, state courts, state legislative and other governmental units. We refer to the long established doctrine that an ad valorem property tax may not be imposed by a state which discriminates against property owners solely by reason of the fact that they are corporations. Such a classification is *per se* unreasonable and constitutes a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

A leading writer states this rule in the following language:

"Classification for exemption purposes may be based on the use to which property is devoted, as well as the nature of the property; but property cannot be exempted merely because of its ownership where the same kind of property owned by others is taxed . . .

Instead of classifying property for the purpose of exemption either by its characteristics or by its uses, the legislature cannot classify the owners of property according to some characteristic possessed by them, or connected with their conduct, and thereupon base an exemption of the property of such persons, regardless of the characteristics possessed by it and of the uses to which it is put." 1 Cooley on Taxation (4th ed.) Para. 280, p. 594.

Corporations, due in large measure to the "artificial nature" of their existence at the sufferance of the states, have been forced, in some instances, to bear a greater proportion of the tax burden than individuals. *White River Lumber Co. v. Arkansas*, 279 U.S. 692 (1929); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1910); *Home Ins. Co. v. New York State*, 134 U.S. 594 (1890). However, classifications where the only perceivable distinction has been corporate as opposed to individual ownership of property have been consistently struck down.

In the landmark California Railroad Tax cases, *San Mateo Cty. v. Southern Pac. R. Co.*, 13 F. 722, *app. dismissed per stip.*, 116 U.S. 138 (1885); *Santa Clara Cty v. Southern Pac. R. Co.*, 18 F. 385, *aff'd on other grounds*, 118 U.S. 394 (1886), the California Constitution directed that for tax purposes the assessed value of all real estate be reduced by the amount of outstanding mortgages—except for property held by railroads and other quasi-public corporations. Finding the discriminatory treatment of the railroads violative of the Fourteenth Amendment, Justice Field held that the California law was invalid because it did not provide for ". . . a different rate of taxation for different kinds of property, but for unequal taxation according to the character of the owner." [Emphasis supplied.] 13 F. 722, 738.

The tax invalidated in the California Railroad Tax cases was not a franchise or privilege tax upon the continued existence of the railroad corporations. *Id.* at p. 754. Justice Field noted, *id.*, that while a State may exclude corporations altogether, it may not require corporations to forego federal constitutional rights as a condition of continuing business. It is upon these cases that the *Quaker City* doctrine has been built.

In *McHenry v. Alford*, 168 U.S. 651 at 666 (1898), this court reviewed a case concerning the exemption from taxation of certain lands held by railroads, and stated:

"... we agree that property of the same kind and under the same condition and used for the same purpose cannot be divided into different classes for purposes of taxation and taxed by a different rule simply because it belongs to different owners"

In 1928 the landmark case of *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 was decided by a divided court, the majority holding unconstitutional on equal protection grounds a Pennsylvania statute which taxed incorporated taxicab companies on their gross receipts while wholly exempting the gross receipts of unincorporated taxicab businesses. The court said (p. 402):

"Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations, as are taxes on their capital stock or franchises The character of the owner is the sole fact on which the distinction and discrimination are made to depend. *The tax is imposed merely because the owner is a corporation.* . . . It follows that the section fails to meet the requirement that a classification, to be consistent with the equal protection clause, must be based on a real and substantial difference having a reasonable relation to the subject of the legislation." (Emphasis added).

The sharp issue drawn by the three dissenting Justices in the *Quaker City Cab* case is explained by their difference with the majority concerning the nature of the tax sought to be imposed by Pennsylvania on business receipts. They viewed the tax not so much as one on property but rather as an excise or privilege tax. Obviously in such a posture 'privilege' not 'ownership' would be the key to permissible classification and the distinction between natural persons and corporations. It is indeed doubtful that there would have been any dissent in that case had the tax been a clear-cut ad valorem property tax as in the instant case. By inherent definition the characteristics of ownership are totally irrelevant in the case of ad valorem property taxes. In the language of Mr. Justice Brandeis' dissent, 'ownership' can not provide a rational or 'real' basis of classification.

Similarly Mr. Justice Stone cast light on the meaning of his dissent when a year following the *Quaker City Cab* case he spoke for the majority of the Supreme Court in *Bromley v. McCaughn*, 280 U.S. 124, 137 (1929) pointing out that an excise or privilege tax may be imposed "upon the exercise of one of the numerous rights of property but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner regardless of the use or disposition made of his property". (Emphasis supplied) ¹

¹ Although the Equal Protection Clause of the Fourteenth Amendment was not involved in this case, the statement of Mr. Justice Stone is of significance since this court has repeatedly held that the criteria for reasonable classification of an excise tax under the Fourteenth Amendment are comparable to the criteria under Article I, Section 8, Clause 1 of the United States Constitution, involved in *Bromley v. McCaughn*.

The *Quaker City Cab* case has been followed in both State and Federal courts which have accepted the continuing vitality of the principles there stated.²

² The *Quaker City Cab Company* rule has been cited, often with detailed excerpts, in over 100 state and lower Federal court decisions as well as in at least 19 subsequent U. S. Supreme Court decisions. Among those cases the following are either directly or tangentially relevant and are therefore cited:

1. *Federal Appellate*

- (a) *Mayor & City of Baltimore v. Williams*, 61 F. 2d 374, 378-379 (C.C.A. 4, 1932) (denial to exempt single railroad from property taxation);
- (b) *Franklin v. Carter*, 51 F. 2d 345, 347 (10th Cir., 1931) (no denial to tax dividend income to individuals only);
- (c) *Southern Boulevard R. Co. v. City of New York*, 86 F. 2d 633, 635 (2nd Cir., 1936);
- (d) *Antilles Surveys, Inc. v. De Jongh*, 358 F. 2d 787 (3rd Cir., 1966) (no denial to impose gross receipts tax exempting receipts attributable solely to taxpayer's personal services).

2. *Federal District*

- (a) *Northwestern National Ins. Co. v. Lee*, 49 F. 2d 274, 278-279 (D. Ore., 1931) (disc. against foreign insurance co.);
- (b) *Joseph Triner Corp. v. Frank McCormick, Inc.*, 11 F. Supp. 145, 147 (D. Minn., 1935)

3. *State*

- (a) *Arkansas Commerce Comm. v. Arkansas & Ozarks Ry Co.*, 235 Ark. 89, 357 S.W. 2d 295, 299 (1962);
- (b) *Silver v. Silver*, 108 Conn. 371, 143A. 244 (1928) (dissent), affirmed 280 U.S. 117;
- (c) *Minneapolis Federation of Teachers v. Obermeyer*, 275 Minn. 347, 147 N.W. 2d 358, 369-370 (1966) (dissent);
- (d) *Richter v. City of Lincoln*, 136 Neb. 289, 285 N.W. 593, 598-599 (1939);

Thus in a case substantially like the case at bar the Kansas Supreme Court invalidated on equal protection grounds a statute which subjected corporation-owned cemetery lands to taxation, while it exempted such lands when owned by individuals. Relying heavily on the *Quaker City Cab* case to hold that the 14th Amendment forbids unjust discrimination between individuals and corporations in respect to taxation of their properties,

² (Continued)

- (e) *Weimer Storage Co. v. Dill*, 143 N.J.E. 307, 143 A. 438, 441 (1928);
 - (f) *Wiramal Corp. v. Directors of Division of Taxation*, 36 N.J. 201, 175 A. 2d 631, 637 (1961);
 - (g) *Community Public Service Corp. v. New Mexico Public Service Comm.*, 76 N.M. 314, 414 P. 2d 675, 678-679 (1966), cert. den. 385 U.S. 933;
 - (h) *Methodist Book Concern v. Galloway*, 186 Ore. 585, 208 P. 2d 319, 322-323 (1949);
 - (i) *Redfield v. Norblad*, 135 Ore. 180, 292 P. 813, 820 (1930), reh. den. 295 P. 461;
 - (j) *City of Philadelphia v. Deputy*, 431 Pa. 276, 244 A. 2d 741, 744 (1968) (dissent);
 - (k) *Martin v. Richardson*, 160 S.C. 370, 158 S.E. 731, 733 (1931);
 - (l) *Xepapas v. Richardson*, 149 S.C. 52, 146 S.E. 686, 691 (1929);
 - (m) *Group No. 1 Oil Corp. v. Sheppard*, 89 S.W. 2d 1021, 1025 (Tex. Civ. App., 1935);
 - (n) *State v. Standard Oil Co.*, 130 Texas 313, 107 S.W. 2d 550, 558 (1937);
 - (o) *Aberdeen Savings & Loan Assn. v. Chase*, 157 Wash. 351, 289 P. 536, 541 (1930), reh. den. 290 P. 697;
 - (p) *H. Row Co. v. Texas Citrus Comm'n.*, 247 S.W. 2d 231, 234 (Tex. 1952)
- But see: *Pennsylvania v. Life Assurance Society of Penna.*, 419 Pa. 370, 214 A. 2d 209 (1965), app. dis. 384 U.S. 268; *Spector Motor Service, Inc. v. Walsh*, 135 Conn. 37, 61A.2d 89 (1948)

the Kansas court observed, *Mt. Hope Cemetery Co. v. Pleasant*, 139 Kan. 417, 32 P. 2d 500, 503 (1934):

"But it [the legislature] will have to tax all privately owned cemeteries alike; and it will not be possible within the limits of our Constitution nor that of the United States to enact a valid statute which shall tax the plaintiff's cemetery because its ownership is vested in a corporation while exempting a neighboring cemetery because the fee title thereto is vested in the bishop of the diocese."

The discriminatory nature of the tax in the instant case is even more pronounced. It taxes all corporations, but no individuals.

A personal property tax with a similar discriminatory classification was likewise invalidated under the 14th Amendment in *Garysburg Mfg. Co. v. Pender County*, 42 F.2d 500 (E.D.N.C., 1930), rev'd other grounds, 50 F. 2d 732 (4th Cir., 1931) (failure to exhaust administrative remedies; dismissed). North Carolina by statute taxed stock in foreign corporations owned by domestic corporations, but it exempted stock in foreign corporations owned by individuals. The court's decision relied heavily on *Quaker City* and the *San Mateo* and *Santa Clara* railroad tax cases, which, to the court, made it obvious that the tax created an unconstitutional, substantial and arbitrary discrimination between an individual and a corporation.

Contrary to Petitioners' implications, *Quaker City Cab* is not the only relevant Fourteenth Amendment decision by this Court invalidating a state taxation scheme. In *Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535 (1934), for example, this Court invalidated an Illinois *ad valorem* personal property tax upon net receipts from casualty insurance received by foreign fire insurance com-

panies, but not upon net receipts from casualty insurance received by foreign casualty insurance companies. Pointedly, the Court noted, *id.* at p. 549:

"There is no basis or reason for making a distinction between them [companies] that has any pertinence to the imposition of a property tax such as is in question. The net receipts which are taxed are not different from those which are not taxed; and both came from the same source. *Such a discrimination in respect of the taxation of real or tangible personal property obviously would be essentially arbitrary.* In principle it is not different with the net receipts." (Emphasis added).

See also: *Hanover Fire Insurance Co. v. Harding*, 272 U.S. 494 (1926) (Illinois tax); *Iowa-DesMoines Bank v. Bennett*, 284 U.S. 239 (1931); *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23 (1931); *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32 (1928); *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

Despite this showing of the vitality of the *Quaker City* doctrine it is argued by those seeking reversal of the Illinois Supreme Court decision that this case has been undermined by certain subsequent decisions of this Court. We now turn to a consideration of those cases cited by them.

Most of the cases relied upon by Petitioners are distinguishable in the framework of the proposition that the tests of validity of taxes depend upon their nature. The three general classes of taxes are *ad valorem* property taxes, income taxes and excise taxes. Fourteenth Amendment tests for one class of such taxes are not necessarily appropriate for another class. Hence, a distinction valid for one purpose will not necessarily be valid for another. *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32,

38 (1928). Ownership of property is not a relevant issue in the case of excise and income taxes.

Property taxes, including taxes on the ownership of property, are based upon value of property possessed in a certain place at a certain time. These are direct taxes. The value of similar property may vary based upon its use. We assert that there is no rational difference in property based solely on the nature of the owner, whereas there can be differences in value based upon the use to which that property is put, *e.g.*, business or non-business use.

Special property classification statutes based on use, such as by railroads, other common carriers, utilities and the like, generally are not denials of equal protection because of the peculiar use of the property, its protected, quasi-public status, and special public policy considerations—rather than ownership *per se*. Among the special cases in this category erroneously relied upon by petitioners as adverse to the *Quaker City* doctrine, is *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938). This Court there held that a special New York tax on utilities and common carriers did not deny equal protection, since these entities enjoyed special status “including relative freedom from competition.” *Id.*, p. 579. Such taxation is justified under the Fourteenth Amendment essentially as a matter of fair equivalence.

Excise taxes are not direct taxes. These taxes essentially are levied incident to the enjoyment of a privilege, engagement in an occupation, or performance of an act. Since a State under its police power may prohibit such enjoyment, engagement or performance, it is empowered to impose restrictions or special burdens by taxation.

Among the excise tax decisions erroneously relied upon by petitioners is *Ft. Smith Lumber Co. v. Arkansas*, 251 U.S. 532 (1920). An Arkansas statute imposed a tax upon capital stock held by a domestic corporation in other corporations, while individuals holding such stock were exempt. This Court found no denial of equal protection. The State, within the permissible public policy of discouraging the holding of stock by one corporation in another, essentially imposed an excise upon enjoyment of that privilege. A second distinguishable excise tax decision is *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1910) (5th Amendment; federal excise tax). The Court therein established that an excise tax may reasonably be imposed upon corporations alone. The principle of fair equivalence operates in this category also.

Taxes upon income are not imposed upon property, and may or may not be tied to privilege, occupation or performance of an act. These are taxes upon the proceeds arising from property or business, *i.e.*, upon the privilege of earning or receiving income. While such a tax has been classified an excise tax, it generally is not considered a property tax, or tax on source. One case in the income tax category relied upon by petitioners is *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E. 2d 633 (1969). The Illinois Supreme Court therein held that the new Illinois income tax is not a property tax (*id.*, 43 Ill. 2d at 42); also that the tax, which imposed a higher tax rate upon corporations than the rate on individuals did not violate equal protection, because of "sufficient differences between the privilege of earning or receiving income as a corporate entity and . . . as an individual." *Id.*, at page 47. The Court also found substantial statutory differences in tax treatment, *e.g.*, allowable deductions, between corpora-

tions and individuals tending to bring about a parity of burden.

Other excise and income tax cases and special property classification cases cited by petitioners are similarly distinguishable.

Another type of case relied upon by Petitioner is to be distinguished because it involved overriding public policy considerations which rendered the discrimination permissible. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), involved an Ohio ad valorem tax on the contents of Ohio warehouses, but exempted from taxation such property held for storage only, if owned by non-residents. The discrimination favored non-residents as against residents, not individuals as against corporations. The Court upheld the statute on Ohio's overriding public policy of encouraging industry, *id.*, at p. 528:

"... a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment."

Allied Stores involved no classification based upon ownership *per se*.

A different but equally justifying public policy consideration was found in *White River Co. v. Arkansas*, 279 U.S. 692 (1929). An Arkansas statute provided for collection of back taxes from corporations, but not individuals, on property which escaped equitable taxation due to inadequate or insufficient valuation. The Court observed that a back-tax statute differs from "an ordinary tax law in which there may be some foundation for the claim that the legislature is expected to make no discrimination".

Id., at p. 697. The Court expressly distinguished *Quaker City Cab Co.*, *supra*, on that ground and found no denial of equal protection. *Id.*, at pp. 696, 699.

Summarizing, in all of the cases relied upon by petitioners, a reasonable ground (not arbitrary as here) for the classification existed and usually the discrimination rested upon a showing of fair equivalence or strong public policy. No such grounds exist and no such state policy is discernible in the instant case as we will next show.

II.

NO VALID PUBLIC POLICY SUPPORTING THE PROPOSED DISCRIMINATION AGAINST CORPORATIONS CAN BE FOUND IN THE LEGISLATIVE HISTORY OF ARTICLE IX-A READ ALONE OR IN CONJUNCTION WITH THE NEW CONSTITUTION OF 1970 OR THE DELIBERATIONS OF THE CONSTITUTIONAL CONVENTION WHICH DRAFTED IT.

Neither Petitioner, nor any other party herein, seriously contends that the personal property tax sought to be imposed solely on corporations by the constitutional amendment is an excise, privilege, occupation or special property classification tax. Thus Petitioner's dilemma short of urging total abandonment of equal protection for corporate persons, is to attempt to justify the discriminatory classification by asserting it to be based on or in furtherance of a valid state policy. Petitioner strains hard, and unsuccessfully, to find such a valid state policy.

(a) Petitioner first contends that the "basic purpose of the Article was to eliminate individual personal property tax in Illinois—a tax which even opponents of Article IX-A admit is discriminatory, unfair, almost impossible

to administer and economically unsound." Brief, p. 13. Of course, the intent of the constitutional amendment is clear on its face and was explicitly stated in the Explanation of Amendment (App. p. 19) as follows: "The Amendment would abolish the personal property tax by valuation levied against individuals."

This demonstrates no valid policy justification whatever, only an acknowledged intent to discriminate. Petitioner's first attempt to find policy thus begs the question; it is to say that the discrimination against corporations is *permissible* because it was *intentional*.

Such a purpose would be unexceptional and within the power of the legislature and the electorate only if individuals alone had been subject to the tax in the first place. Petitioner's less than careful references to the asserted purpose of eliminating "the individual tax" and to eliminate "individual personal property tax in Illinois" (Brief p. 13) somewhat casually overlook the fact that prior to the adoption of the new constitutional provision all personal property in Illinois was subject to tax. The constitutional amendment did not alter the definition, classifications or rate of assessment; its only effect was to exempt a certain class of owners from payment of a pre-existing tax and to leave corporate persons alone subject to the tax.

Petitioner's quite candid explanation is that the discrimination is justified by the comparative ease of collection against corporations of a tax described by petitioner as "discriminatory, unfair, almost impossible to administer and economically unsound". Petitioner is thus urging that Illinois be allowed to classify corporations because they and not individuals are "readily identifiable" and thus susceptible to coercive measures with respect to payment

of taxes. Brief p. 13-14. No court has ever sanctioned such a distinction as being consonant with equal protection.

(b) The legislative history affords no foundation for Petitioner's gratuitous assertion that the purpose of Article IX-A was "to encourage the delegates to the state constitutional convention which was then in session" to revise the Illinois tax system. Contrary to that assertion, the convention was not in session either at the time of the drafting of Article IX-A or the referendum of Nov. 3, 1970, when the amendment was approved by the electorate. In fact at the time of legislative adoption of Senate Joint Resolution 30 the delegates had not yet been chosen.

There is not a scintilla of evidence in the record to suggest that the legislature, in adopting Article IX-A on June 30, 1969 had as its high motive the instruction and encouragement of then unchosen delegates in the merit and virtue of revenue reform. With the new and less-than-popular Illinois income tax about to become effective August 7, 1969 it would be more plausible to speculate that S.J.R. 30 (Art. IX-A) when adopted by the legislature was intended to relieve political pressures resulting from the income tax by offering individual voters exemption from personal property tax as at least a partial off-set.

If, for purposes of present argument, 'encouragement' of 'reform' is accepted as the legislative goal, one can only observe that such a goal would scarcely be advanced by discrimination between corporations and individuals. A tax scheme is neither modernized nor reformed when a tax acknowledged to be unjust is discriminately maintained against one class and removed from another. A constitu-

tion ought not to play favorites among classes of taxpayers.

Actually the official statement accompanying the proposed Amendment when submitted to the electorate disclosed no intention whatever that in the future the personal property tax as to corporations would be ended. In fact, the Explanation accompanying the Amendment explicitly stated that the tax on corporations would not be affected (App. p. 19). Actually that was a candid and correct admission since the subsequent Convention's decision concerning personal property taxes could not be known or forecast.

(c) In the same effort to find a saving purpose or state policy Petitioner argues that since "(i)t was financially impossible to totally abolish the tax immediately," (Brief p. 21) and since the tax was effectively administered as to corporations but not as to individuals (Brief p. 21), therefore, it was "reasonable" to exempt only individuals from liability. The clear import of this reasoning, especially since the "reform" was submitted for ratification to the very persons it would benefit most, is that the Illinois legislature wished to have the best of two worlds; namely to take a politically popular action by removing the tax as to individual voters without sacrificing substantial revenues needed by the schools and municipalities of the state. Corporations, defenseless at the polls and the source of the bulk of the property tax receipts, would continue to be liable.

A state "policy" of this description can hardly be said to validate a discrimination so clearly in violation of the equal protection clause. Not surprisingly the constitutional amendment was approved by an "overwhelming

majority" vote as Petitioner finds comfort in pointing out. Brief p. 21. That is no answer. Political popularity cannot cloak a denial of equal protection with validity. Equal protection can not be denied even by overwhelming vote. *Lucas v. 44th General Assembly*, 377 U.S. 713, 736-737 (1964).

(d) Petitioner also urges that since the Illinois Constitutional Convention, and subsequently the electorate, did adopt a provision which would eventually eliminate all personal property taxes by 1979, Illinois Constitution of 1970, Article IX, sec. 5(c), the prior Article IX-A amendment of the old Constitution must be seen as the "first step" in a comprehensive plan of reform. Petitioner's Brief at 14. This after-the-fact rationalization is not supportable.

Petitioner would justify the invidious discrimination implicit in the constitutional amendment by urging upon this court that there is a public policy in Illinois which looks to ultimate abolishment of all *ad valorem* personal property taxation. That such a long-range policy exists is clear; that such a policy cannot justify and was not intended to justify violation of the equal protection clause is equally clear. Petitioner asserts (and the State's Attorney of Cook County makes a similar argument—see Part IV hereof) that Article IX-A was the initial step in a program of the new Constitution to end all such taxation by 1979. These interpretations are at the best but half truths and petitioners are totally in error if they mean to assert that the new Constitution mandated immediate abolishment of individual personal property taxes. To the contrary, the new constitution carries forward only such individual exemptions under Article IX-A as shall ultimately be defined and held valid by the courts. That,

of course, is what the present case is all about and hence petitioners beg the question by their circuitous argument. The convention was fully aware of the 'equal protection' problems involved in the amendment. Thus the convention chose neither to accept nor to reject Article IX-A. It followed the middle-course of Sec. 5(c) of Article IX hereinafter quoted.

The delegates to the Sixth Illinois Constitutional Convention were aware of the existence of the legislative enactment which was to become Article IX-A. The Convention adopted the proposed constitution on September 3, 1970. Two months later the voters would pass on Article IX-A. The Convention delegates accordingly were required to give thought to the effect of the adoption of Article IX-A upon the proposed new Constitution. The Convention could have ignored the amendment to the 1870 Constitution and provided for it to lapse at the effective date of the new Constitution. It was felt, however, that since public consideration of the amendment would take place shortly before the submission of the new Constitution the effect of its likely adoption should be provided for in the future organic law of the state. This latter view prevailed in the convention and is reflected in Section 5 of Revenue Article IX of the 1970 Constitution:

(a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.

(b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.

(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal

property taxes and concurrently therewith shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3(a) of this Article.

These three sections are also in a real sense a contemporaneous interpretation of the limited scope of Article IX-A in providing as they do for (1) continuation of taxation of personal property, with provisions for classification and abolition of any or all classes; (2) the provision of subparagraph (b) upholding any abolition of ad valorem personal property taxes occurring in consequence of the constitutional amendment prior to the effective date of the 1970 Constitution, and (3) the detailed provisions for ultimately "phasing out" all remaining personal property taxation on or before January 1, 1979, subject to the replacement of lost revenue by forms of taxation other than real and personal property taxes on the same classes of taxpayers relieved of personal property taxation after January 2, 1971.

Thus, throughout its deliberations, the Constitutional Convention was faced with a severe drafting dilemma. It was necessary for it either to structure any revenue article of a new constitution with concern for the meaning, application and legal effect of the pending constitutional

amendment—matters which were anything but clear; or it could proceed to draft new provisions with total disregard of the pending proposition—a course publicly unacceptable. The difficulty was also compounded by the doubts which existed concerning the interpretation of the word “individuals” as used in the amendment and doubts concerning the constitutionality of particular interpretations under the equal protection clause. A measure of the uncertainty felt by many delegates to the Convention was aptly expressed in floor debate by Stanley C. Johnson, a member of the Revenue Committee, who stated:

“Mr. President, the amendment in November is clouded with so much uncertainty as to its application that we will be years, we fear, trying to figure out what it really means. There have been opinions registered that it will not apply to joint tenants, that it will not apply to trusts, that it will not apply to partnerships. Certainly it will not apply to corporations. So that it may eventually boil down to what it applies to is whether or not the property is used in the production of income or not.” (June 25, 1970, Transcript Vol. 74, p. 11)

Professor Dawn Clark Netsch, who served as Vice Chairman of the Revenue Committee (referring to Section 5(b) of Article IX of the Constitution of 1970, hereinabove quoted) writing in the November, 1970 issue of the Chicago Bar Record, p. 114:

“The coverage of this subsection depends, in turn, on the coverage of the proposed November amendment abolishing the tax ‘as to individuals’. Presumably, the courts will have settled these questions by the time the personal property tax is finally eliminated in 1979. If the courts should decide—possibly to avoid equal protection issues—that an individual engaged in a retail grocery business as a sole pro-

prietorship is not relieved of paying the personal property tax pursuant to the November referendum because his competitor down the street, who is incorporated, is not relieved, that business individual would be picked up by subsection (c) and relieved of the tax in the second phase-out. He would then be liable for a share of the replacement tax."

Delegate Malcolm S. Kamin in his article "Constitutional Abolition of Ad Valorem Personal Property Taxes, 60 Ill. Bar Journal, p. 432 at 434 writes:

"It was generally agreed that the voting public would pass this amendment, whatever its precise meaning. Thus, one must consider that throughout debate on the Revenue Article, every delegate probably had in mind that members of the public would be expressing themselves in overwhelming favor of Article IX-A at about the same time they were being asked to vote on the product of the Convention."

In this context of timing problems and uncertainties as to meaning and legality the Convention drafted a constitutional program, subsequently approved by the voters, which provided for legislative phasing out of all ad valorem personal property taxation by 1979, with safeguards to avoid disastrous results to the public schools and municipal services. The program did not mandate the immediate exemption of individuals from personal property taxation as suggested by petitioners. It merely provided for the recognition of such abolition of individual personal property taxation, *if any*, as the courts would determine to have occurred under the preceding constitution as amended by Article IX-A.

Even if the Convention had sought to incorporate Article IX-A into the new constitution, which petitioners er-

roneously contend was the case, it is obvious that such an incorporation could not validate a provision repugnant to the 14th Amendment of the Federal Constitution. The Cook County State's Attorney in effect is really arguing that even if Article IX-A creates an unconstitutional exemption, that defect will be cured in the course of 8 years as everyone becomes exempt. No cases or theories can be cited to support such an ephemeral and transitory view of equal protection. .

The basic question remains unaffected by the new Illinois Constitution. That question is whether or not the creation of a given classification of property taxpayers finds its justification in more than a desire to free one class from taxation while imposing a property tax upon another. Certainly any future classification adopted by the Illinois General Assembly pursuant to Article IX, Section 5(a) of the new Constitution will be similarly tested under Federal standards. The adoption of Section 5(c) obviously did not validate the unconstitutional Article IX-A.

From the foregoing it is clear that no valid state policy exists to justify the patent discrimination against corporations and that petitioners' efforts to find such a policy wholly fail. It is equally clear that the Illinois Supreme Court was correct when it found: "It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set."

III.

THE REVERSAL OF THE ILLINOIS SUPREME COURT'S OPINION WOULD END EQUAL PROTECTION OF THE LAWS FOR CORPORATE PERSONS AND WOULD HAVE VASTLY DESTRUCTIVE LEGAL, SOCIAL AND ECONOMIC CONSEQUENCES.

We have shown in the first two argument headings of this brief that the Illinois Supreme Court conclusively determined the purported exemption for "individuals" contained in Article IX-A applied to all non-corporate persons and that no valid policy consideration exists for this distinction between property owned by individuals and property owned by corporations for the purpose of taxation. We have also shown that a long line of cases would prohibit such a classification based upon equal protection grounds. A series of cases has been cited extending over a period of 90 years which exemplify this rule. However, both realistic jurisprudence and this Court's granting of certiorari in this case indicate that mere reliance upon the existence of long-standing rules may not be in itself sufficient to prevail. Therefore, these amici do contend in this brief that the judgment of the Illinois Supreme Court is not only in accordance with the rule of *stare decisis* but also continues constitutional protections in an area where such protections are practically desirable. In short, corporations "ought" to be accorded the equal protection upon which they have relied for so long. An analysis of this issue requires a consideration of the evolution of constitutional rights accorded to corporations in this country.

The American concept of equal protection extends from the basic American ideal of fairness. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). At common law, the term

"person", including both natural persons and artificial persons, generally included corporations. *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. 497, 555, 558-559 (1844). The Supreme Court of the United States quickly reached the same definition of "person" in construing the equal protection clause of the 14th Amendment. *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 396 (1886). The Court stated in *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897):

"The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

Perhaps because it is not a static concept, "equal protection of the laws" escapes precise definition, *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37 (1927). This Court has construed the provision as a general requirement that all persons and their property in similar circumstances be treated equally by the State in its exercise of powers, including the power of taxation. The decision of the Illinois Supreme Court in the cases at bar is consistent with this historical evolution of the Equal Protection clause. A reversal of these decisions would eliminate the sound, long-standing principle of equal protection that artificial and natural persons be treated equally for property taxation purposes.

Thus in the decisions of this Court since 1844, in principle, and since *Quaker City*, (1928) in fact, corporations have been treated no differently than other "persons"

regarding the imposition of ad valorem property tax. While reasonable classifications based upon the use or the nature of property are allowable, the attempted creation and discrimination against a class based solely upon ownership alone has been held impermissible.

The petitioners and three of the respondents in this case ask this Court to take a constitutionally startling action. They seek the removal of equal protection guarantees from a class which by everyone's admission, has previously been entitled to such protection. No case has been cited by any party seeking reversal of the Illinois Supreme Court which even remotely provides authority for such a step. The history of the equal protection clause has been one of expansion rather than withdrawal. Could the petitioners and their supporters reasonably contend that property owned by Irish, Jewish, or Black persons should be taxed differently than that owned by other persons? In such a formulation the question begs the answer. It would be inconceivable that these groups, entitled as they are to equal protection of the laws, could have such right removed. The attempt to discriminate against corporations in this case is constitutionally indistinguishable from such an attack upon an ethnic, religious or racial group.

The petitioners, in effect, ask that corporations henceforth be declared and treated as "non-persons" for the purpose of Federal constitutional protections. Such a step would be totally out of keeping with basic constitutional principles as well as prior rulings in Supreme Court cases. While the principle of *stare decisis* may not always carry the day, it is surely not likely to be ignored by this Court. One of the central elements in the stability of our legal system is the ability of citizens to be free from abrupt and unheralded changes in the

law. In some instances a change can be foreseen based upon a series of slight modifications of a given rule. The rule expressed in the *Quaker City Cab* case is, however, true black letter law.*

Such law has been relied upon by state and local taxing authorities and by corporate and non-corporate businesses as providing a norm of reference believed to have been established with finality by this Court. Every state in the union allows the levying of a local real property tax. With the exception of Delaware and New York, every other state in the country levies a personal property tax of some kind. Corporations have reasonably relied in their acquisition of billions of dollars of real and personal property upon the fact that their property would be treated no differently for tax purposes than identical property held under other forms of ownership.

To reverse this rule after 90 years of stability would bring about a change in the tax structure of this country by judicial action which would have destructive and wasteful effects. Small corporate businesses would be placed at a serious economic disadvantage as against identical businesses operated under other ownership forms. Larger corporations would seek evasions of the unjust classification by placing their property in the hands of natural persons. All corporations would be required to react in

*"Unless specifically exempted, all corporate property, real or personal, is subject to tax in the same manner as if it were held by an individual. However, there must be no discrimination as between individuals and corporations in the same class." (Citing *Quaker City Cab*)

[Prentice-Hall
State & Local Taxes
All States Unit
Sec. 93, 638]

various ways to their loss of constitutional protections. None of these reactions would be helpful to economic growth.

The arguments in the cases at bar involve an Illinois tax relied upon principally by school districts and the exemption of natural persons from that tax. The implications of this case, however, effect every state in the union and every business which operates in the corporate form. If the Illinois Supreme Court be reversed, widespread state experimentation in the creation of additional burdens resting solely or differently upon corporations will surely follow.

A prime example of such experimentation would be the placing of the entire burden of ad valorem property taxation upon corporations. While the cases at bar involve the imposition of a tax only upon personal property such a tax is indistinguishable in its equal protection implications from a tax upon real property. Thus, if the property of corporate persons may be taxed while that of natural persons is exempt the same is true of real property. Such a ruling would place corporate real property in a position where it might become the sole source of the $41\frac{1}{2}$ billion dollars in property taxes collected each year by state and local governments. In the past such governmental bodies have been somewhat restricted in the nature and amount of such property taxes since they were payable by all property owners. The voters of a community had a sure method of telling their elected officials when the property tax burden had become too high. Corporations however do not vote and as is pointed out by the petitioners they generally pay their taxes. If a state legislature can answer the voters' cry for more funds by an increase in the corporate real property tax

it can escape the citizens wrath at the polls. Stripped of their equal protection guarantees in the area of real and personal property taxation corporations become not taxpayers but targets.

Once corporations have lost their equal protection clause rights, the governmental experimentations in creating special burdens will not stop at taxation. If a corporate property tax is possible then there is no reason why distinctions may not be made against corporations in the exercise of the police power. Corporate owned property might be required to comply with a different building code or zoning ordinance than property held in a different manner. Corporations could be required to pay state and municipal fees in amounts different than fees payable by natural persons for similar services. Corporations could be charged a higher rate for water, sewer or electricity than a non-corporate user in the same industry. Untold discriminations could and would result if a class with many wealthy members were to suddenly lose its constitutional guarantee of fairness and equality.

It is perhaps ironic that four medium or small school districts in Illinois should be placed in the position of arguing on behalf of all corporations in this country. In this case, however, the perfectly proper legal interests of these amici are identical to those of business corporations. These amici are not opposed to constitutionally valid exemptions of personal property taxation. We feel, however, that as guardians of the educational well-being of the children of our school districts we have a responsibility to see that all taxes validly imposed within the state are collected and that improper exemptions are contested. The interest of corporations is, of course, to pay no more taxes for real or personal property than

any other owner of such property. In this case, those interests coincide.

It would surely be of interest to this Court that the Illinois General Assembly has recently taken a substantial step towards rectifying the constitutional errors which we contend were committed in the drafting of Article IX-A. The Legislature, on June 13, 1972, passed House Bill 4218. That bill provides a standard deduction for personal property tax purposes of \$5,000.00 of personal property owned by any taxpayer within the state, corporate person or natural person. Whether such a device escapes all constitutional infirmities is perhaps a question for another court on another day. The fact remains, however, that the creation of such a flat deduction, available to all taxpayers (both corporate and individual) alleviates the obvious lack of equal protection apparent from Article IX-A. The petitioners in this case argue as if Article IX-A is the only way to free the citizens of Illinois from a hated tax. The passage of House Bill 4218 and the mandate for the phasing out of all personal property taxation contained in the 1970 Illinois Constitution will shortly accomplish the sought after goal in a constitutionally permissible manner. For want of such approach, the constitutional rights of corporations throughout the country ought not be sacrificed in the name of Illinois tax relief.

IV.

THE ILLINOIS SUPREME COURT DID NOT IGNORE OR OVERLOOK THE NEW ILLINOIS CONSTITUTION, AS ARGUED BY THE COUNTY OFFICERS, BUT CORRECTLY CONCLUDED THAT THE BASIC FEDERAL QUESTION, INVOLVING VIOLATION OF THE EQUAL PROTECTION CLAUSE, REMAINED UNAFFECTED BY THE ADOPTION OF THAT DOCUMENT.

In this section these amici direct their arguments to the Petition for Writ of Certiorari to the Illinois Supreme Court, filed by the State's Attorney of Cook County on behalf of Edward J. Barrett and other county officers. The State's Attorney has chosen to submit his Petition for Writ of Certiorari as his brief in this court. These amici attempted to meet the arguments raised by the State's Attorney in their previously filed Brief In Opposition to the granting of certiorari. Much of what follows was submitted in that earlier brief but is set out here for the convenience of the Court.

The petition for writ of certiorari, standing as the brief of Edward J. Barrett, County Clerk of Cook County, et al., is devoted almost completely to arguments concerning the adoption of the Illinois Constitution of 1970 which became effective several days prior to the rendition of the opinion and judgment herein sought to be reviewed. Without explaining how the new Constitution remedied the invidious discrimination implicit in Article IX-A of the 1870 Constitution and violative of the equal protection clause, petitioners charge that the Illinois Supreme Court ignored the new constitution, which in their view introduced a new dimension in this case. In developing this theme, they present a number of unsupported and irrele-

vant variations. For example, in "Questions Presented" they gratuitously demand to know how "the highest court of the state can ignore the existence of the new state constitution . . . and circumscribe the extent of its examination in determining the public policy of the state . . ." They ask how the court could ignore the context in which Article IX-A of the prior constitution was adopted, claiming the constitutional amendment which was held invalid was "the first step of the program provided in the new constitution for the eventual abolishment of the personal property tax." They strongly imply that either by oversight (Pet. p. 39) or by deliberate design (Pet. p. 5) the Illinois Supreme Court ignored its own precedents and failed to apply the law existing at the time of decision in favor of the law existing at the time the case arose. Petitioners even go so far as to argue that by failing to mention the new constitution of 1970 in its opinion, the Illinois Supreme Court "caused to be born . . . a substantial federal question impelling this court's consideration . . ." (Pet. p. 5).

We take issue with these arguments of the petitioners. The contention that the Illinois Supreme Court ignored or overlooked the advent of the Illinois Constitution of 1970 is totally unsupportable in point of fact. The petitioners' arguments that the Constitution of 1970 requires validation of Article IX-A are likewise without merit in point of law.

To argue that the Illinois Supreme Court and Mr. Justice Schaefer in writing his opinion would ignore or overlook such an important development in the supreme law of the state as the taking effect of a new constitution is scarcely plausible on its face. The facts are totally the other way. Both in the briefs and in the oral argu-

ments presented to that Court, the new constitution was the subject of serious and repeated references by counsel for the several parties. The leave granted to these amici (as petitioners in *Maynard* No. 44308) in the Illinois Supreme Court to file as a matter of original jurisdiction their petition for declaratory judgment, was in response to their petition which recited the importance of considering the new constitution, as well as the old, in deciding the issues of the case and contained their offer to make such a presentation to the Court. One of the attorneys for the amici, Samuel W. Witwer, who participated in the arguments before the Illinois Supreme Court, served as President of the Sixth Illinois Constitutional Convention, the body which drafted the new constitution. Clearly the court was aware of the new constitution and its provisions relating to personal property taxation.

It should be obvious that there is no rational basis for concluding, as petitioners have done, that because the court failed to mention the new Constitution in its opinion it either ignored or overlooked the document. This basic fact cannot be sidestepped by the reiteration of incantations concerning the "exquisite, juridical intimacy" (Pet. p. 3) of old and new constitutions, unwarranted charges of judicial oversight or neglect and similar arguments designed to ignore the fundamental issue. It is evident from the opinion that the court viewed the basic Federal constitutional question, i.e., the violation of the equal protection clause, as unaffected by the emergence of the Illinois Constitution of 1970.

V.

THE INTERPRETATION OF ARTICLE IX-A ADOPTED BY THE TRIAL COURT IN THE LAKE SHORE CASE IS INCONSISTENT WITH THE RULES OF STATUTORY INTERPRETATION, WOULD PERMANENTLY ABOLISH ALL PERSONAL PROPERTY TAXES AND CAUSE FINANCIAL CHAOS FOR SCHOOLS, MUNICIPALITIES AND ALL OTHER PUBLIC BODIES IN ILLINOIS.

In the trial court, Lake Shore Auto Parts Co. procured an interpretation of Article IX-A which resulted in a judgment abolishing all personal property taxes for individuals *and corporations* in Illinois. That argument was rejected first by the Illinois Supreme Court and secondly by this court in its refusal to grant certiorari to Lake Shore for a reconsideration of that argument (No. 71-674). Upon the refusal of this court to grant it certiorari, Lake Shore moved that it be allowed to withdraw from the case since its sole interest before this court would be the seeking of the affirmance of its trial court victory. This court denied the motion to withdraw. We are informed that the respondent's brief to be submitted by Lake Shore will reiterate the arguments upon which the trial court decision was achieved. These amici believe that it is quite improper for Lake Shore, supposedly entrusted, as respondent, with the mission of sustaining the Illinois Supreme Court to raise these arguments in its brief. If these amici were "parties" to the litigation, they would move that the offending portions of the Lake Shore brief be stricken. Not being parties, we resubmit to this court, in substantially similar form, those arguments which we presented to the Illinois Supreme Court where we were accorded the status of parties and where we did directly answer the contentions of Lake Shore.

The plaintiff in *Lake Shore* is a corporation. That case was brought as a class action on behalf of all corporations in the state. The plaintiff most effectively represents its class when it succeeds in bringing about a total abolition of personal property taxes for corporations. The plaintiff in *Lake Shore* could not accomplish this purpose by attacking the constitutionality of Article IX-A. If Article IX-A falls, the prior provisions of Illinois law would continue in force. Under the existing Revenue Act, corporations, business entities and individuals (however, that term be defined) would continue to be subject to personal property taxation (Chapter 120, Section 499, *Illinois Revised Statutes, 1969*). If Article IX-A were to be declared unconstitutional, corporations would receive some tax relief in that they would share the tax burden with all other taxpayers in the state. But, as has been seen, the optimum success for Lake Shore Auto Parts Co. would be not the sharing of taxation but the abolition of the tax for corporations and ironically for everyone else as well. *Lake Shore* has constructed its argument with that goal in mind.

The complaint of Lake Shore Auto Parts Co. does not allege the unconstitutionality of Article IX-A; instead, the plaintiff was scrupulously careful to limit its constitutional attack to a prior existing statute rather than to the Constitutional Amendment. Its argument is as follows:

The Revenue Act of the State of Illinois (Chapter 120, Section 482, et seq., Illinois Revised Statutes, 1969) provided prior to the passage of Article IX-A for ad valorem personal property taxation of all real and personal property in the state with certain exceptions. The effect of the passage and approval of Article IX-A was to amend the Revenue Act so as to repeal the personal property

tax for all but corporations. Once this amendment by implication was accomplished, it is the personal property tax statute which must itself be swept away as a violation of the 14th Amendment because of its discrimination against corporations. The result of this theory of interpretation is that the Illinois Revenue Act, as it relates to personal property is, in its entirety, declared unconstitutional.

Since the Revenue Act is the only statutory enactment of the state regarding the establishment of a personal property tax, the result of such a judicial finding would be an immediate abolition of ad valorem personal property for all taxpayers in the state.

At the trial court level in the *Lake Shore* case, the plaintiff was able to achieve the amazing result of the judicial abolition of an established and important tax by ignoring the question of the constitutionality of Article IX-A itself, and directing the court's attention only to the Revenue Act. Amici submit that the Illinois Revenue Act (which has been constitutional for thirty years) has not suddenly become unconstitutional.

Section 499 of the Illinois Revenue Act (Chapter 120, *Illinois Revised Statutes, 1969*) has, since 1939, defined the personal and real property of this state which is subject to taxation. Sections 500 through 500.23 of the Act define property put to certain uses which are granted an exemption from such taxes. It would need little argument to show that if a particular exemption adopted by statute were unconstitutional it would be the exemption rather than the entire tax which would fall. An exemption, for example, of all personal property owned by state legislators would undoubtedly fall before a constitutional attack. Such an attack, however, would leave the general personal property tax enabling section unaffected and in full force.

This case differs from that situation in only one respect. The exemption is contained not in the Revenue Act but in the Constitution. That, difference, however, can hardly justify the effect of the *Lake Shore* trial court's ruling which was to uphold the enactment that created the invidious distinction and to strike down the enactment that did not. Such a strange ruling could only be the result of the trial court's misconception that as between a valid and constitutional statute and a constitutional amendment that creates an invidious classification, the statute must fall to save the amendment. Such is not the law.

In *Reitman v. Mulkey*, 387 U. S. 369 (1967), an amendment to the California Constitution would have repealed prior "open housing" statutes. The Supreme Court of the United States affirmed the judgment of the California Supreme Court which ruled the amendment to be unconstitutional and the prior statutes to remain in effect. In reaching its decisions, the California Court looked to several factors:

"A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective (In re Petraeus (1939) 12 Cal. 2d 579, 583, 86 P.2d 343; see Griffin v. County School Board, 377 U.S. 218, 231, 84 S.Ct. 1226, 12 L.Ed.2d 256), and for its ultimate effect (Jackson v. Pasadena City School Dist. (1963) 59 Cal.2d 876, 880, 31 Cal. Rptr. 606, 382 P.2d 878; Gomillion v. Lightfoot (1960) 364 U.S. 339, 341-343, 81 S.Ct. 125, 5 L.Ed.2d 110; Avery v. State of Georgia (1953) 345 U.S. 559, 562, 73 S.Ct. 891, 97 L.Ed. 1244; Near v. State of Minnesota (1931) 283 U.S. 697, 708-709, 51 S.Ct. 625, 75 L.Ed. 1357). To determine the validity of the enactment in this respect it must be viewed in light of its historical context and the conditions existing prior to its enactment. (Select Base Materials v. Board of

Equalization (1959) 51 Cal.2d 640, 645, 335 P.2d 672; *Evans v. Selma Union High School Dist.* (1924) 193 Cal. 54, 57-58, 222 P. 801, 31 A.L.R. 1121; see *Snowden v. Hughes* (1944) 321 U.S. 1, 8-9, 64 S.Ct. 397, 88 L.Ed. 497.)"

[*Mulkey v. Reitman*, 50 Cal. Rep. 881, 884]

The Supreme Court of the United States specifically endorsed this method of interpretation and announced that: "Judgments such as these we have frequently undertaken ourselves." [citing cases] (387 U. S. at 373)

The *Reitman* case involved racial discrimination while the case at bar involves economic discrimination. In the *Reitman* case the Court looked to the entire state of the law. Both the constitutional amendment and the statute had to be construed together to test whether a constitutional result would be reached. When the two enactments read together led to unconstitutionality, the enactment most responsible for that result was ruled to be void. Thus this Court rejected the argument that the constitutional amendment there in question was valid while the underlying statutes must fall. The effect of the California constitutional amendment was to sanction racial discrimination. Likewise, in the case at bar, it is the amendment and not the (revenue) statute which affects a violation of the equal protection clause.

Article IX-A must be viewed together with other pertinent provisions of Illinois law. If, as the *Lake Shore* Court ruled, Article IX-A causes the Revenue Act to be unconstitutional, it will abolish all personal property taxes in the state. Such a result would not be consistent with the intent of the Legislature in proposing the amendment nor consistent with the intent of the people in approving the amendment. Both the Legislature and the

people contemplated that some class or classes would continue to pay personal property taxes even after the effective date of Article IX-A. Whatever the Legislature and the people had in mind, it can at least be said that they anticipated a limited tax exemption and not a total tax abolition. In *Village of Glencoe v. Hurford*, 317 Ill. 203, 148 N.E. 69, it was said:

"When the literal enforcement of a statute would result in great injustice and lead to consequences which the legislature could not have contemplated, the courts are bound to presume that such consequences were not intended and will adopt a construction which it may be reasonable to presume was contemplated by the Legislature." (at 220)

The Illinois Supreme Court has also said:

"If a statute admits of two constructions, one of which renders the enactment reasonable and salutary while the other renders it mischievous, if not absurd, the latter construction should be avoided."

[*Karlson v. Murphy*, 387 Ill. 436, 443]

The *Lake Shore* interpretations of Article IX-A would, in the most offhanded and unconscious of ways, entirely repeal an important tax utilized by almost every public body in the state. This is due to the fact that Article IX, Sec. 5(b) of the new Constitution provides: "Any ad valorem personal property tax abolished on or before the effective date of their Constitution shall not be reinstated."

That subsection "makes room" for the limited exemption of Article IX-A by providing that any ad valorem personal property tax abolished before July 1, 1971 shall not be reinstated. If paradoxically Article IX-A is constitutional and yet (as the respondent in *Lake Shore* contends)

it, in turn, renders unconstitutional all other ad valorem personal property taxes this form of taxation may not be reinstituted. The decision of the trial court in the *Lake Shore* case would remove from the General Assembly the power to reinstitute an ad valorem personal property tax so long as Section 5(b) is contained in the 1970 Constitution. Such a result would be both bizarre and destructive.

The result would be bizarre in that it would be dictated by stilted tests of construction which would neither honor the constitutional intent nor adequately consider the effect of such interpretation. The result would be destructive in that it would in an instant cause financial chaos for school districts, municipalities and nearly all other public bodies in the state.

Illinois local governments and public bodies have been extremely limited in the sources and amounts of revenue available to them. Most public bodies in the state levy a property tax payable from the assessments of real and personal property. The percentage which this tax bears to the total public revenues varies based upon the availability of other income sources. In municipalities, annexation and license fees, fines collected from ordinance violations, utility taxes and profits from local utility services supplement the amounts received from property taxes. School districts and other special service public bodies are, however, far more limited in their sources of revenue. For them property taxes make up the predominant share of their local income. In many school districts a large percentage of revenue is attributable to the assessment of personal property. The *Lake Shore* decision would *immediately* and *permanently* wipe out this source of revenue.

The amount of assessed valuation of real and personal property has always played an important part in the financial planning of public bodies. The ability to issue bonds has been directly connected with the tax base of the public body. The amount of assessed valuation is an important factor in the ability of governmental bodies to issue bonds and in the rate of interest which they will be required to pay. If the personal property tax is totally abolished public bodies will find their tax base and borrowing powers suddenly diminished.

If all personal property taxes are declared unconstitutional as a result of this Court's adoption of the trial court's position the following named amici and other public bodies will lose, yearly, revenues in excess of the following stated amounts:

Proviso Township High School	
District #209	\$ 1,752,231
Cicero Grade School	
District #209	\$ 1,203,169
County of Cook	\$19,837,514
Metropolitan Sanitary District	\$ 7,746,448
City of Chicago	\$11,625,517
Chicago Board of Education	\$70,102,183
Chicago Park District	\$13,662,772

Substantial reduction in the tax base of all public bodies in the State would occur and the statewide loss in yearly revenues for school districts, municipalities, counties and other public bodies would exceed \$250,000,000.00.

These amici and the class they represent are unlike private corporations which can expand and contract their production based upon the availability of capital. A school district must teach all the children enrolled; a sanitary district must treat all the sewage it receives; and, a city cannot provide police services only three days a week. The new Constitution was drafted with this in mind and

therefore provides in Article IX Section 5(c) for the replacement of all personal property taxes abolished. We ask the court to take judicial notice of the difficulties faced by public bodies in recent years in providing a full and effective range of services upon revenues undiminished by personal property tax exemptions.

CONCLUSION

In a well litigated and vigorously contested lawsuit the Illinois Supreme Court found that the Constitution of the United States would not be bent so as to make corporations the only payers of the Illinois ad valorem personal property tax. The Court, perhaps realizing that corporations can hardly defend themselves at the polls against invidious discrimination, rejected the attempts of legislators to bestow such a singular burden upon them. The Illinois Supreme Court relied upon established precedents of this Honorable Court in reaching its politically unpopular but legally correct and just result. This Court should affirm the decision of the Illinois Supreme Court which held, in effect, that the equal protection clause of the 14th Amendment does not shift with prevailing political winds.

Respectfully submitted,

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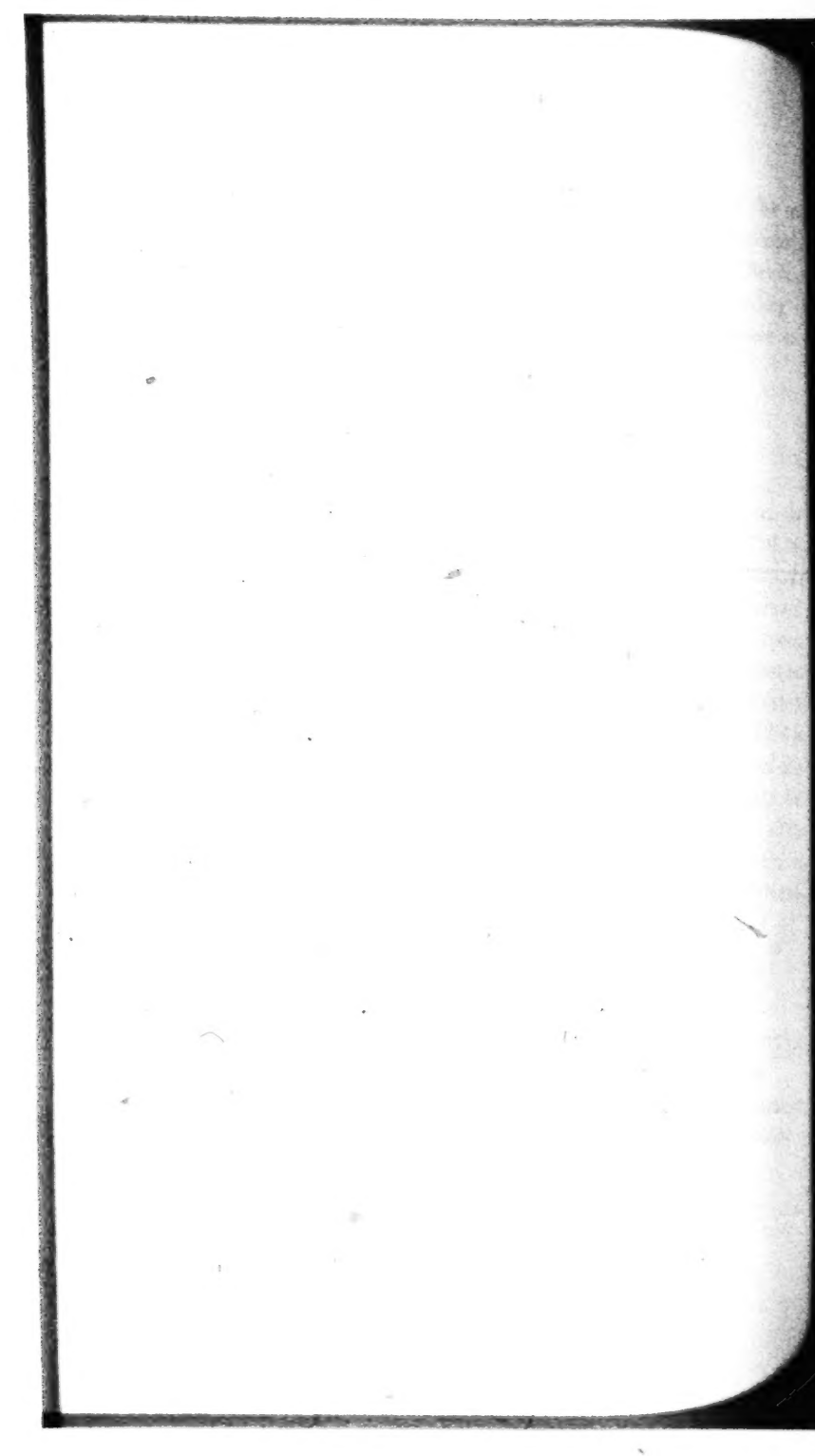
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IN CASE

NO. 53 193

Supreme Court of the United States

October Term, 1931

ROBERT J. LEHRMANN, Member of Department of
Local Government Affairs of the State of Illinois

Petitioner

No. 71-55

vs.

LAKE SHORE AUTO PARTS CO., et al.

Respondent

EDWARD J. BARRETT, County Clerk of
Cook County, Illinois, et al.

Petitioner

No. 71-56

vs.

CLARENCE E. SHAPIRO, et al.

Respondent

On Writs Of Certiorari To The Supreme Court Of Illinois

BRIEF OF LAKE SHORE AUTO PARTS CO., ET AL.,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT J. LEHNHAUSEN, Director of Department of
Local Government Affairs of the State of Illinois,
Petitioner,

vs.

LAKE SHORE AUTO PARTS CO., et al.,
Respondent.

EDWARD J. BARRETT, County Clerk of
Cook County, Illinois, et al.,
Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,
Respondents.

On Writs Of Certiorari To The Supreme Court Of Illinois.

**BRIEF OF LAKE SHORE AUTO PARTS CO., ET AL.,
RESPONDENT IN NO. 71-685**

**CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED.**

A. 14th Amendment to the Constitution of the United
States:

"Nor shall any State . . . deny to any person within
its jurisdiction the equal protection of the laws."

B. Illinois Constitution of 1870, Article IX-A:

"Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals.

SCHEDULE

"Paragraph 1. This amendment shall become effective January 1, 1971."

C. Revenue Act of 1939 (Ill. Rev. Stat., ch. 120, §499 et seq.), especially Section 18 thereof (Ill. Rev. Stat., ch. 120, §499):

"The property named in this section shall be assessed and taxed, except so much thereof as may be, in this act, exempted: First: all real and personal property in this state. . . ."

QUESTIONS PRESENTED FOR REVIEW.

The basic constitutional question presented for review is stated somewhat too narrowly at page 2 of the brief of Robert J. Lehnhausen, Director of the Department of Local Government Affairs of the State of Illinois, the Petitioner in *Lake Shore Auto Parts Co., et al., v. Korzen, et al.*, No. 71-685 (hereinafter referred to as "the State", or as "the State of Illinois").

Lake Shore Auto Parts Co., an Illinois corporation, suing in its own behalf and as representative of a class of corporations and other non-individuals similarly situated, Be

Respondent in No. 71-685 (hereinafter referred to as "Lake Shore"), suggests the following statement as being more appropriate:

"Whether the equal protection clause of the fourteenth amendment permits a state to discriminate, for ad valorem tax purposes, as between identical property owned by natural persons and that owned by corporations, where in each instance the property is put to the same use and located in the same place."

A second question, necessarily implied in the basic issue, is whether the Illinois Supreme Court erred when, after finding that the equal protection clause *does* prohibit such discrimination, it held that the appropriate solution was to invalidate Article IX-A of the Illinois Constitution of 1870, thereby causing personal property taxes to be reimposed on all taxpayers in the State of Illinois, both natural persons and corporations, and nullifying the referendum at which Article IX-A had been adopted.

A third question necessarily presented is whether the adverse judgment of dismissal on the merits in *Shapiro v. Barrett* against M. Weil & Sons, Inc., an Illinois corporation, purportedly acting on behalf of a class of corporations including Lake Shore (said judgment having been affirmed by the Illinois Supreme Court, and no review thereof having been sought in this Court by M. Weil & Sons, Inc. or any other member of its purported class), has *res judicata* effect as to Lake Shore so as to bar Lake Shore from further participation in these consolidated proceedings.

In addition, a number of other issues are sought to be raised in the Petition for Certiorari filed by certain Cook County taxing officials in *Shapiro v. Barrett*, No. 71-691, and in the briefs filed by various Respondents in that case.

These issues appear so unsubstantial as not to warrant answer.⁽¹⁾ Furthermore, the parties to *Shapiro v. Barrett* do not appear to be seriously pressing those arguments in this Court.⁽²⁾

(1) For example, the argument that Article IX-A should be interpreted so as to be applicable only to personal property "held by natural persons and used for their own personal use and enjoyment", which argument was accepted by the trial judge in *Shapiro v. Barrett* (App. 16) is patently frivolous and was decisively rejected by the Illinois Supreme Court (49 Ill. 2d, at p. 146-8). Inasmuch as the Illinois Supreme Court's ruling on this issue constitutes a state court's interpretation of its own constitution and raises no federal constitutional question, that issue is not reviewable here. *American Federation of Labor v. Watson*, 327 U.S. 582, 596 (1946).

(2) The Cook County taxing officials, Petitioners in *Shapiro v. Barrett* (No. 71-691) have not bothered to file a brief on the merits, and the briefs filed by the nominal Respondents are cursory in nature. The apparent indifference of the parties in that case may well be because they now have their minds set on more important matters. After certiorari was granted by this Court, the trial judge in *Shapiro v. Barrett* entered two orders which together have the effect of sequestering all personal property taxes collected in Cook County, other than those paid by corporations. The first of such orders was entered on April 13, 1972, on motion of the taxing officials and without objection of the *Shapiro* plaintiffs. The second order was entered on May 31, 1972, on motion of certain of the *Shapiro* plaintiffs and without objection from the taxing officials. It thus appears that, irrespective of the outcome in this Court, the participants in *Shapiro v. Barrett* will have available a substantial fund with which to handsomely compensate themselves for their efforts herein,—notwithstanding that those efforts have contributed nothing to the case.

STATEMENT OF THE CASE.

The Statement of the Case contained in the State's brief is generally accurate and fair. It does, however, contain two errors which should be corrected.

1. At page 4, the State asserts that Lake Shore alleged (in its original complaint) that Article IX-A violated the fourteenth amendment by exempting from ad valorem personal property taxation all personal property owned by "individuals", while authorizing and requiring the continued ad valorem taxation of all personal property owned by entities other than "individuals". This same misstatement of Lake Shore's position appears in the opinion of the Illinois Supreme Court, 49 Ill. 2d, at p. 141.

In actuality, Lake Shore's Complaint contained no such allegation, and was carefully drawn to avoid any such inference. The only allegation of unconstitutionality made by Lake Shore pertained to the taxing statute, and not to Article IX-A. That allegation appears in paragraph 15 of its complaint (Rec. 67) in the following language:

"The various provisions of the Revenue Act of 1939, insofar as they purport to impose ad valorem taxes with respect to personal property owned by corporations and other 'non-individuals' are invalid, unconstitutional and of no effect whatsoever by reason of the denial of the equal protection of the laws to plaintiff and to the members of the class which plaintiff represents."

2. At pages 2-3 of the State's brief, the following statement appears:

"Article IX of the Illinois Constitution of 1870 granted to the state General Assembly the power to levy a tax by valuation 'so that every person and corporation shall pay a tax in proportion of his, her, or its property'".

That statement is clearly in error. The General Assembly's power to levy taxes, by valuation or otherwise, was not conferred by the Illinois Constitution, but rather inheres in the sovereignty of the State. *MacMurray College v. Wright*, 38 Ill. 2d 272, 276 (1967). Article IX served only as a limitation on that inherent power, by requiring that any such ad valorem tax on property be levied uniformly, so that every person and corporation should pay a tax in proportion to the value of his, her or its property.^(*) Article IX-A, when added by amendment, was intended to both authorize and require a departure from that rule of uniformity by prohibiting any tax on the personal property of "individuals".

Lest there be any misunderstanding, it should be emphasized here that Article IX-A was an amendment to the Illinois Constitution of 1870. That Constitution has since been superseded by the new Illinois Constitution of 1970, which became generally effective on July 1, 1971. The new Constitution does not contain language corresponding to

(*) Article IX, §9 of the Constitution of 1870 contained a similar uniformity requirement with respect to taxes levied by local governmental units.

Article IX-A. It is nevertheless clear that Article IX, §5(b), thereof was intended to incorporate the requirements of Article IX-A into the new Constitution.⁽⁴⁾

Certain unusual features of this litigation should also be called to the Court's attention at this point. All property taxes collected in Illinois (with the very minor exception of the tax on foreign private car lines) go to local governments and not to the State. Yet the State is the only defendant in *Lake Shore Auto Parts v. Korzen* (No. 71-685) which sought certiorari in this Court. The Cook County taxing officials, also defendants in No. 71-685, and who are most intimately concerned with personal property taxation, did not seek review in that case. They did, however, successfully seek certiorari in *Shapiro v. Barrett*, No. 71-691, notwithstanding that they had achieved complete victory in that case in the Illinois Supreme Court.

The only pleading filed by these Cook County officers in *Shapiro v. Barrett* was a motion to dismiss the complaint on the grounds that it did not set out a cause of action. (Rec. 291). The trial judge granted that motion as to three of the plaintiffs (all except Shapiro) and ordered the complaint dismissed as to them (App. 17). As to the fourth plaintiff (Shapiro) the trial judge denied the motion to

⁽⁴⁾ Section 5(b) of Article IX of the 1970 Constitution reads as follows: "Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated." The peculiarly obscure language of Section 5(b) [and also of Section 5(c)] is apparently attributable to the compromise of various political considerations which confronted the delegates to the Constitutional Convention. See Kamin, *Constitutional Abolition of Ad Valorem Personal Property Taxes: A Looking-Glass Book*, 60 Ill. Bar Jnl. 432, 434 (1972). The language of Section 5(b) was settled on by the Constitutional Convention prior to the date of the referendum on Article IX-A, but in anticipation that Article IX-A would be approved by the electorate.

dismiss. On appeal, the Illinois Supreme Court sustained the trial court's dismissal of the complaint as to the three plaintiffs (though for a different reason), and reversed the order denying the motion to dismiss as to Shapiro, remanding with directions to dismiss the *Shapiro* complaint in its entirety (49 Ill. 2d, at p. 151).

None of the plaintiffs in *Shapiro v. Barrett* sought review of the order of the Illinois Supreme Court dismissing their complaint. Hence, they appear in this Court as Respondents.

To complicate the situation still further, the so-called *Maynard* plaintiffs, who filed an original action in the State Supreme Court on the representation that their participation was essential to a full determination of the issues, were the only parties to this litigation who asserted the unconstitutionality of Article IX-A itself (albeit as a secondary argument) and this position was ultimately adopted by the Illinois Supreme Court. Nevertheless, that Court ordered that the *Maynard* complaint be dismissed (49 Ill. 2d, at p. 152), apparently because the Court felt that it had acted improvidently in agreeing to accept original jurisdiction thereof (49 Ill. 2d at p. 145). Thinking themselves to be winners, the *Maynard* plaintiffs made no attempt to seek review of that order of dismissal. Inasmuch as they were not parties to either of the other two consolidated proceedings, they now find themselves excluded from participation in this litigation,—except, perhaps, in the status of *amicus curiae*.

SUMMARY OF THE ARGUMENT.

Prior to 1971 the Constitution of Illinois (Const. of 1870, Art. IX, §1) required that any tax which might be imposed on property, both real and personal, be assessed uniformly, so that every person and corporation would pay a tax in proportion to the value of his, her or its property. Accordingly, the Revenue Act of Illinois has long authorized taxes on "all real and personal property in this state."

By an amendment to that Constitution (Article IX-A), proposed by the legislature and approved overwhelmingly by the People at a referendum in November of 1970, the taxation of personal property by valuation was prohibited "as to individuals".

As a necessary consequence of the adoption of that constitutional amendment, the Revenue Act thereafter purportedly imposed ad valorem taxes only on personal property not owned by "individuals". While the meaning of "individuals" is nebulous, it is agreed that the term does not encompass corporations.

The personal property tax is a property tax by any definition, and is not a franchise, privilege or occupation tax. For almost ninety years the courts of this country have consistently held that the equal protection clause of the fourteenth amendment prohibits discrimination, for property tax purposes, based solely upon the corporate characteristics of the property owner. That doctrine was recognized by this Court as early as 1895 in *McHenry v. Alford*, 168 U.S. 651, 666, and expressly adopted in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928).

The discriminatory taxing pattern established in Illinois as a consequence of the interaction between Article IX-A and the Revenue Act is in no sense related to the nature or use of the property subjected to tax, or to its location. Nor can the discrimination be rationalized as serving some legitimate legislative purpose. The Official Explanation of the Amendment, and the Official Argument in Favor of its Adoption, both of which were prepared by the state legislature and circulated to every elector in the state, are all-inclusive, and suggest no valid reason whatsoever for the distinction as between corporate-owned and individually-owned property.

Accordingly, the Illinois Supreme Court properly held that the discrimination was prohibited by the equal protection clause. That Court, however, erred in striking down Article IX-A itself, rather than the Revenue Act,—thus causing personal property taxes to be reimposed upon all taxpayers, both corporate and individual. Article IX-A imposes no tax, and is inoffensive to the fourteenth amendment. Only the taxing statute itself, as necessarily modified by Article IX-A, imposes an invalid tax. That statute, and not the constitutional amendment, should have been stricken down.

Finally, the adverse judgment rendered below against M. Weil & Sons, Inc. (one of the plaintiffs in the consolidated case of *Shapiro v. Barrett*, No. 71-691), although purportedly rendered against a class which included Lake Shore Auto Parts Co. (the plaintiff in No. 71-685), is not *res judicata* as to Lake Shore Auto Parts Co. because of the total want of due process of law in the entry of the class action order in *Shapiro v. Barrett*.

ARGUMENT.

I.

A CLASSIFICATION WHICH DISTINGUISHES AS BETWEEN CORPORATIONS AND NATURAL PERSONS FOR THE PURPOSE OF IMPOSING AN AD VALOREM PROPERTY TAX IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Preliminary Statement.

Where the application of the equal protection clause to state taxing statutes is in issue, certain general propositions of law have been stated so often by this Court that they are not open to dispute:

1. "The fourteenth amendment is not intended to compel the states to adopt an iron rule of equal taxation." (*Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890)). "A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." (*Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910)).

2. "But the classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circum-

stanced shall be treated alike." (*F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." (*Morey v. Dowd*, 354 U.S. 457, 464 (1957)).

3. "The nature of a tax must be determined by its operation rather than by particular descriptive language which may have been applied to it." (*Educational Films Corp. of America v. Ward*, 282 U.S. 373, 387 (1931)).

The repetition of these generalities, unfortunately, is of little assistance in determining whether or not the particular form of discriminatory taxation established subsequent to the adoption of Article IX-A is a permissible one. Proper resolution of that issue, in Lake Shore's view, requires a detailed examination of the decided cases and their underlying rationale.

Several other propositions of law, somewhat narrower in scope than those mentioned above, appear to be equally well established:

4. Corporations are "persons" within the meaning of the fourteenth amendment. *Pembia Consol. Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 188 (1888); *Southern Railway Co. v. Greene*, 216 U.S. 400, 412 (1910).

5. The privilege of doing business in corporate form within the territorial jurisdiction of a state is a matter of legislative grace, and not one of constitutional right. A state legislature, no doubt, could prohibit all corporate activity within its borders. *Paul v. Virginia*, 8 Wall. 168 (1869). Having the power to ex-

clude absolutely, the legislature unquestionably has the right to impose conditions upon the exercise of the privilege, including the payment of taxes. This is particularly true in view of the unique advantages which inhere in the corporate form of organization. *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *Thorpe v. Mahin*, 43 Ill. 2d 36 (1969).

6. Nevertheless, a state may not require a corporation to waive and forego rights guaranteed by the federal constitution as a condition for the exercise of its charter privileges. Once the corporation has paid the requested price for its charter (or for its admission to the state in the case of a foreign corporation), then that corporation becomes entitled to the full benefits of the protection afforded by the constitution. *Hanover Insurance Co. v. Harding*, 272 U.S. 494, 507 (1926); *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 571 (1949).

7. Yet, the proposition stated in paragraph 6 clearly does not preclude the state from thereafter increasing its franchise tax on corporations, or from imposing new and additional taxes on the privilege of doing business in corporate form. That is merely to say, however, that by granting a charter or certificate of admission the state does not contract away its sovereign power of taxation. *Home Insurance Company v. New York*, 134 U.S. 594 (1890).

In the light of the foregoing, the basic issue in this case may well be viewed simply as a matter of determining whether the discriminatory taxation of corporations vis-à-vis natural persons can properly be considered a tax on the privilege of doing business in corporate form, as contended

by the State (Pet's. Brief in No. 71-685, at page 15), or whether, as Lake Shore believes, it was neither intended nor serves as such a privilege tax but is instead imposed on corporations alone for the sole and simple reason that corporations, unlike individuals, are not entitled to vote.

From the perspective of an elected public official, no doubt, a classification designed to curry favor with the electorate may well appear as a rational one; but that is hardly the sort of rationality which is required of legislative classifications by the equal protection mandate. If the position advanced by the State of Illinois is sustained by this Court it would be tantamount to a holding that corporations are no longer to be deemed "persons" entitled to the protection of the fourteenth amendment. Furthermore, it would come very close to a holding that the fourteenth amendment has no application to property rights. Such a reversal of long-standing judicial policy ought not to be undertaken lightly,—particularly when this Court, in the very recent case of *Lynch v. Household Finance Corporation*, U.S., 92 S. Ct. 1113, 1122 (1972), observed that personal liberties and property rights are indistinguishable.

B. The Position Urged by the State of Illinois Would Produce Serious and Undesirable Consequences.

Lest the import of this case be underestimated, it is well to consider some of the practical consequences which will necessarily follow if this Court should see fit to adopt the position urged upon it by the State of Illinois:

1. Assume that two competing businesses are located in the same community. Each produces or sells the same

goods and they both own identical assets. One business is operated in corporate form, and the other as a sole proprietorship. Only the corporate business will be required to pay an ad valorem personal property tax on its inventories, fixtures, work-in-progress and raw materials. The sole proprietorship is exempt from this heavy burden, even though its property and business are identical to those of the corporation.

2. Since there clearly is no basis for distinguishing an ad valorem personal property tax from an ad valorem tax on real estate, a state legislature will be empowered to establish the same form of discrimination as between identical parcels of real estate, depending on whether they are owned by corporations or by individuals,—and quite without regard to the use to which such real estate is put. Taking into consideration the realities of political life, it is certain that this power will be widely exercised once the constitutional restraint is removed.

3. The pattern of discrimination thus authorized will bear no relationship whatsoever to wealth, to ability to pay, to benefits received, or to any other established criterion of tax equity. The individual who owns the hypothetical business or parcel of real estate may be a person of enormous wealth and huge income who owns many other businesses or much real estate. The corporate owner, on the other hand, may have no other assets at all, and, indeed, that corporation's capital stock may comprise the sole asset of its stockholders.

Lake Shore respectfully submits that it is all but impossible to find a rational basis for a classification which produces these results,—unless one is willing to assume

that it reflects a legislative policy designed to discourage the ownership of personal property by corporations. Yet, the State of Illinois, in its brief, does not remotely suggest that this is the case. Nor is any such policy even hinted at in the Explanation of Article IX-A or in the Argument in Favor thereof, both of which documents were prepared by the General Assembly and circulated to all voters in the state prior to the November, 1970, referendum (Rec. 160). These official documents together constitute the clearest possible exposition of the legislative intent underlying Article IX-A, and presumably, also of the electorate's intent in adopting that Article at referendum. The texts of these documents are included herein as Appendix A to this brief. If the General Assembly of Illinois did in fact desire to discourage the ownership of personal property by corporations it surely would have advised the electorate to that effect, and set forth the reasons which made such action appear appropriate.

C. Long-Established Interpretations of the Fourteenth Amendment Prohibit a Property Tax Which Discriminates Against Corporate Ownership.

For nearly ninety years it has been settled doctrine that an ad valorem property tax may not be imposed which discriminates against property owners solely by reason of the fact that they are corporations. Such a classification is *per se* unreasonable, and constitutes a deprivation of the equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution.

Judge Cooley stated the rule in even broader form:

"Classification for exemption purposes may be based on the use to which property is devoted, as well as the nature of the property; but property cannot be exempted merely because of its ownership where the same kind of property owned by others is taxed . . . Instead of classifying property for the purpose of exemption either by its characteristics or by its uses, the legislature cannot classify the owners of property according to some characteristic possessed by them, or connected with their conduct, and thereupon base an exemption of the property of such persons, regardless of the characteristics possessed by it and of the uses to which it is put." 1 Cooley on Taxation (4th ed., 1924) ¶280, p. 594.

Another respected authority has stated "that there would very probably be no dissent" from the proposition that the United States Supreme Court is prepared to guarantee to all corporations equality with individuals in respect to all property taxation. Sholley, *Corporate Taxpayers and the Equal Protection Clause*, 31 Ill. L.R. 463, 589 (1937).

The doctrine, insofar as it is relevant to the case at bar, had its origin in two decisions of the 9th Federal Circuit Court in the *California Railroad Tax* cases: *San Mateo County v. Southern Pacific R. Co.*, 13 Fed. 722 (1882), app. dism. per stip., 116 U.S. 138 (1885); and *Santa Clara County v. Southern Pacific R. Co.*, 18 Fed. 385 (1883), aff'd. on other grnds, 118 U.S. 394 (1886). See also *San Bernardino County v. Southern Pacific R. Co.*, 118 U.S. 417 (1886).

The history and background of these famous cases has been detailed elsewhere.⁽⁵⁾ The litigation arose out of the 13th Article of the California Constitution of 1879, which provided that, *except as to railroads and other quasi-public corporations*, the value of any outstanding mortgage or other encumbrance was to be deducted from the assessed value of the property subject thereto. The defendant railroads challenged their assessments on various grounds, among them being a claim that this provision denied to them the equal protection of the laws. That issue was presented to the court, along with the even more fundamental question of whether a corporation was a "person" within the equal protection clause of the then recently enacted fourteenth amendment.

The chief opinion in each of the cases was written by Justice Field, an Associate Justice of the United States Supreme Court assigned to the circuit. In each case, also, there is a concurring opinion by Justice Sawyer.

The court, after extensive consideration of the issues, held that corporations are "persons", and that the operation of the constitutional provision in question *did* deprive them of the equal protection of the laws. The relief ordered was a reduction of the assessment by the amount of the outstanding indebtedness, so as to place the railroads on a parity with natural persons. (18 Fed. at p. 414).

⁽⁵⁾ See, e.g., Sholley, op. cit., 31 Ill. L.R. 463 and 567, at 469-474 (1937); McLaughlin, *The Court, The Corporation and Mr. Conkling*, 46 Am. Hist. Rev. 45, 52 (1940); and see the dissenting opinion of Justice Douglas, and the concurring opinion of Justice Jackson in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576, 574 (1949).

Justice Field first undertook to meet the argument that the California Constitution did nothing more than impose a "reasonable classification", stating (13 Fed. at p. 737-8):

"It is not classifying property to provide that the property of certain parties . . . shall be assessed at its value after deducting the mortgage; and that the property of other parties . . . shall be taxed at its full value without any deduction. That is not providing for a different rate of taxation for *different kinds of property, but for unequal taxation according to the character of the owner.*" (emphasis added)

In his subsequent opinion in the *Santa Clara* case, (18 Fed. at p. 408), Justice Field restated the basis for rejecting the "reasonable classification" contention:

"The discrimination between the railroad companies and individual proprietors, in the estimate of the value of their property, is made because of its ownership, and not from any specific differences in the character of the property, or in the specific uses to which it is applied."

Justice Sawyer, in his concurring opinion, was equally incisive on this question (18 Fed. at p. 432):

"Classification should have reference to the different character, situation, and circumstances of the property, making a different form or mode of taxation proper, if not absolutely necessary. It cannot be arbitrarily made with mere reference to the nationality, color, or character of the owners, whether natural or artificial persons, without any reference to a difference in the character, situation, or circumstances of the property."

The taxing bodies then argued that, even if the assessment could not be sustained as a property tax, it ought

to be sustained as a franchise tax,—i.e., a “condition of the continued existence of the railroad corporation” (13 Fed. at p. 754).

The court recognized, of course, that the State of California had the right to exclude the corporation entirely from the doing of business within its borders, and therefore the right to impose such conditions as it chose as a condition for admission or for continued permission to do business. Nevertheless, Justice Field presented two answers to this argument:

1) The California constitutional provision in question, and the statute thereunder, *were not intended as a franchise tax* or a condition for the continuation of the franchise;

2) The right of the state to exclude the corporation altogether does not mean that the state may, as a condition for continued permission to do business, require the corporation to waive and forego the rights otherwise guaranteed to it by the United States Constitution; “What the state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution.”^(*)

Appeals to the United States Supreme Court were filed in both cases. *San Mateo* was settled by the parties and the appeal withdrawn (116 U.S. 138). In the *Santa Clara County* case, this Court did pronounce that corpo-

(*) This “second answer” of Justice Field has been fully accepted by the United States Supreme Court, though its most common application has been in situations where the discrimination is against foreign corporations vis-a-vis domestic corporations. See *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571 (1949), and cases cited therein.

rations are "persons" under the fourteenth amendment, thus giving to the case a measure of immortality. The Court, however, avoided a decision on the specific question of whether the California constitutional provision denied equal protection to the railroad, and the Circuit Court decision was instead affirmed on a narrow technical ground (118 U.S. 394). In a concurring opinion in the companion case of *San Bernardino County v. Southern Pacific R. Co.*, 118 U.S. 417, 423 (1886), Justice Field expressed strong regret that the Court had not seen fit to decide the important constitutional question, stating:

"The question is not whether the state may not claim for grants of privileges and franchises a fixed sum per year, or a percentage of earnings of a corporation,—that is not controverted,—but whether it may prescribe rules for the valuation of property for taxation which will vary according as it is held by individuals or by corporations. The question is of transcendent importance, and it will come here, and continue to come, until it is authoritatively decided in harmony with the great constitutional amendment which insures to every person, whatever his position or association, the equal protection of the laws; and that necessarily implies freedom from the imposition of unequal burdens under the same conditions."

Yet, despite the absence of a definitive Supreme Court holding, the Circuit Court opinions in the *California Railroad Tax* cases were accepted quickly by both the federal and state courts as a correct interpretation of the equal protection clause: *Walker v. Northern Pacific Ry.*, 47 Fed. 681, 686 (C.C.N.D., 1891); *Russell v. Croy*, 63 S.W. 849, 853-7 (Mo., 1901); *Northern Pacific Ry. Co. v. Sanders County*, 214 Pac. 596, 599 (Mont. 1923); *State ex rel Northern Pacific Ry. Co. v. Duncan*, 219 Pac. 638, 640

Mont. 1923); *Gamble-Robinson Fruit Co. v. Thoreson*, 204 N.W. 861, 864-5 (N.D. 1925); *Northwestern Improvement Co. v. State*, 220 N.W. 436, 439-40 (N.D. 1928).

The language of the North Dakota Supreme Court in the *Gamble-Robinson* case, *supra*, is typical:

"It is a settled rule of law, as applicable to tax matters as to other concerns of government, that legislative classification, to be legitimate, must have regard to differences in character or use of property, character of the business affected or of governmental relationship, and cannot be purely arbitrary . . . Or, to use the language of Justice Brewer, in the case of *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U.S. 150, 17 S. Ct. 255, 41 L. Ed. 666, the classification must be 'one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' It requires no argument to prove that the character of the ownership—that is, as to whether a given species of property is owned by a corporation, joint-stock company, or association, or owned by an individual—affords no reasonable basis for classification. . . . If, therefore, the legislation is subject to the constitutional limitation of equal protection, it cannot be sustained."

As early as 1898, this Court by way of dictum in *McHenry v. Alford*, 168 U.S. 651, 666, indicated approval of the position taken by Justice Field in *The California Railroad Tax* cases:

". . . we agree that property of the same kind, and under the same condition, and used for the same purpose, cannot be divided into different classes for purposes of taxation, and taxed by a different rule, simply because it belongs to different owners. . . ."

In *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389 (1928) this Court, relying on *The California Railroad Tax* cases, held unconstitutional, as a violation of the equal protection clause, a statute of Pennsylvania which imposed a tax on the gross receipts of incorporated taxicab companies (both domestic and foreign) while wholly exempting the receipts of unincorporated taxicab businesses.

A tax on business receipts is not ordinarily thought of as a property tax, and the Court did not specifically so characterize it, although such might be inferred from the statement (at p. 401) that "a characterization of the tax by the state court is not binding here".⁽¹⁾

As the basis for its holding, this Court stated (p. 402):

"Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations, as are taxes on their capital stock or franchises. . . . The character of the owner is the sole fact on which the distinction and discrimination are made to depend. *The tax is imposed merely because the owner is a corporation.* . . . It follows that the section fails to meet the requirement that a classification, to be consistent with the equal protection clause, must be based on a real and substantial difference having a reasonable relation to the subject of the legislation." (emphasis added)

Three separate dissents were filed by Justices Holmes, Brandeis and Stone, and the thrust of each of them is the same,—that the tax was in reality an excise on the

⁽¹⁾ Then Pennsylvania Supreme Court had sustained the discrimination at least partly on the ground that the tax was not a tax on property. 287 Pa. 161, 169 (1926).

privilege of operating a taxicab business in corporate form. Therefore, it should have been sustained on the authority of cases such as *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911). In other words, the dissenting justices took sharp issue with the majority's view that "the tax is imposed merely because the owner is a corporation". As they saw it, "ownership", as such, had nothing at all to do with the particular tax in question. (In the case now at bar, of course, "ownership" has everything to do with the tax in question).

The "character of the owner" has no bearing whatsoever in the case of a true excise tax. By definition, ownership is irrelevant. The tax is imposed upon the exercise of some act or privilege. Sometimes, admittedly, the line of demarcation is not easy to discern,—though that is hardly a problem in this case. In *Bromley v. McCaughy*, 280 U.S. 124, 137 (1929),⁶ this Court recognized that an excise or privilege tax may be imposed "upon the exercise of one of the numerous rights of property, but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property" (emphasis added).

There is every reason to believe that each of the dissenting justices in *Quaker City Cab* would have joined the majority in condemning a true property tax which discriminated against corporations solely on the basis of ownership. This is evident not only from the language of the dissenting opinions themselves, but also from other contemporaneous opinions of the dissenters.⁽⁶⁾

⁽⁶⁾ See, for example, Brandeis' dissenting opinion (joined by Holmes and Stone) in *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 53 (1927), where he argues that the Kentucky mor-

In any event, and whether or not this Court was correct in its characterization of the particular tax there in issue, there can be no doubt that the *Quaker City Cab* case stands at least for the proposition that the equal protection clause prohibits discriminatory taxation against corporations based solely on the ownership of property. The net result of the case is to elevate to Supreme Court status the earlier holdings in the *California Railroad Tax* cases, and thereby vindicate the judgment of Justice Field.

Quaker City Cab has been followed on innumerable occasions. For example, in *Garysburg Mfg. Co. v. Pender County*, 42 F. 2d 500, 506 (E.D.N.C., 1930), rev'd. on other grnds., 50 F. 2d 732 (4th Cir., 1931), a federal district court invalidated a North Carolina statute which required that shares of stock in foreign corporations should be assessable on an ad valorem basis as personal property when owned by corporations, but not when owned by individuals.

After first characterizing the tax as a property tax, and not an excise tax, the court, in a thoughtful opinion, noted that there was "no logical recognized or necessary reason for the distinction", and that "such legislative

page recording act should have been sustained notwithstanding the exemption of short term mortgages, because "the characteristics of this deed of trust clearly furnish a basis for reasonable classification as compared with probably every mortgage exempted from the recording tax. If the statute as applied does not in fact discriminate in favor of any property of a like nature, there is not inequality in treatment." (emphasis added). Compare also Cardozo's dissenting opinion, joined by Brandeis and Stone, in *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 550 (1934), where the debate centered only around the question of whether the majority had correctly characterized the tax there in issue as a "property tax".

action cannot have any other purpose or justification than evident intent to discriminate against the corporation" in violation of the fourteenth amendment.

The holding in *Garysburg Mfg. Co. v. Pender County* is clearly irreconcilable with the earlier case of *Fort Smith Lumber Co. v. Arkansas*, 251 U.S. 532 (1920), wherein this Court, in a very brief opinion, had sustained an Arkansas statute which was virtually identical to the North Carolina law stricken down in *Garysburg*. The judge in the latter case believed that *Fort Smith* had been effectively overruled by *Quaker City Cab*. This belief is apparently shared by Professor Sholley,^(*) and would seem to have been confirmed by the subsequent course of history,—*Fort Smith Lumber Co. v. Arkansas* has almost never been cited as authority in later cases and has fallen into virtual obscurity. *Quaker City Cab*, on the other hand, quickly became a landmark decision in the interpretation of the equal protection clause. See, for example, *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 549 (1934); *Redfield v. Fisher*, 292 Pac. 813 (Ore. 1930), reh. den. sub nom. *Redfield v. Norblad*, 295 Pac. 461 (1931), cert. den. 284 U.S. 617 (1931); *Aberdeen S. & L. Ass'n v. Chase*, 289 Pac. 536, 541 (Wash., 1930), op. on reh., sub nom. *Washington Mutual Savings Bank v. Chase*, 290 Pac. 697 (1930); *Mount Hope Cemetery Co. v. Pleasant*, 32 Pac. 2d 500, 503 (Kan. 1934); *State v. Hunt*, 9 N.E. 2d 676, 681-2 (Ohio, 1937); *H. Row Co. v. Texas Citrus Comm'n.*, 247 S.W. 2d 231, 234 (Tex. 1953).

In the cases thus far considered, the discrimination held unconstitutional was directed against corporations

(*) Sholley, *Corporate Taxpayers And The Equal Protection Clause*, 31 Ill. L.R. 463 and 567, 588 (1937).

such, and in favor of natural persons. Also very much relevant to the problem at hand is a long and well-established line of cases in this Court which have laid down the rule that a property tax may not, under the equal protection clause, serve as the basis for discriminating against foreign corporations and in favor of domestic corporations.

The origin of this rule can be traced to *Southern Railway Co. v. Greene*, 216 U.S. 400 (1910), and its most recent application was in *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119 (1968). The leading case is *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), wherein this Court held invalid, on equal protection grounds, an Ohio statute which required that certain categories of intangible personal property be subject to ad valorem taxation only if owned by non-residents or foreign corporations. The holding of the Court is summarized in the following language (337 U.S. at 571-2):

"After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own progeny, at least to the extent that their property is entitled to an equally favorable ad valorem tax basis. . . . Ohio holds this tax to be an ad valorem property tax . . . and in no sense a franchise, privilege, occupation or income tax."

The position of the State of Illinois in the instant case, apparently, is that *Glander* (to say nothing of *Quaker City Cab*) has been effectively overruled by *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959). If *Allied Stores* was the final word on the subject this contention might have a semblance of plausibility,—for *Allied Stores* (discussed infra at p. 40) is arguably a troublesome

decision. The argument advanced by the State of Illinois (at p. 16 of its Brief) is, however, clearly refuted by *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 259 (1965), wherein this Court on the authority of *Wheeling Steel Corp. v. Glander*, summarily reversed an Ohio State Court decision [196 N.E. 2d 114 (Ohio App., 1963)] which had upheld a statute exempting domestic corporations from an ad valorem personal property tax imposed on foreign corporations. The significance of this case lies in this Court's summary rejection of the argument advanced by the Ohio Tax Commissioner that *Glander* had been effectively overruled by the *Allied Stores* decision,⁽¹⁰⁾—the same argument which the State of Illinois advances here.

D. The Traditional Distinction as Between Property Taxes and Nonproperty Taxes Reflects a Genuine and Important Difference.

The authorities considered in the immediately preceding section of this brief were all concerned directly with the operation of the equal protection clause upon state taxing statutes. It is clear from these authorities that characterization of the tax in question, either as a "prop-

⁽¹⁰⁾ See brief of Appellee in *Reserve Life Insurance Co. v. Bowers*, U.S. Sup. Ct., October term, 1964, Docket No. 96, at p. 8. Professor Jerome Hellerstein has observed that the Ohio State Court's decision, if it had been allowed to stand, would have made it "virtually impossible for any taxpayer to demonstrate that the requisite lack of uniformity or unreasonableness of classification exists." Hellerstein, *State and Local Taxation, Cases and Materials* (West Pub. Co., 3rd ed., 1969).

erty tax" or as a "nonproperty tax",⁽¹¹⁾ has been a crucial factor in determining the permissible scope of classification.

The tax involved in this case,—an ad valorem tax on personal property,—is a true property tax by any definition, and the State does not otherwise contend. Implicit in the State's brief, however (and explicit in the *amicus curiae* brief of the Honorable Richard B. Ogilvie, Governor of Illinois), is the contention that the long-standing distinction between property taxes, on the one hand, and nonproperty taxes on the other, is an artificial, outmoded and generally meaningless one which ought to be dispatched to an overdue grave.

Lake Shore suggests, however, that the traditional dichotomy represents a substantial and genuine distinction that is firmly grounded in the history of taxation, in economic theory, in contemporary constitutional language, both state and federal, and, above all, in the judicial decisions of the courts of this country. Indeed, most of the classic opinions rendered by this Court in the field of taxation have turned upon the characterization issue. Whether each of those cases was correctly decided is beside the point. To adopt the State's argument here

⁽¹¹⁾ The actual use of the term "nonproperty tax" is relatively rare, both in judicial opinions and in constitutional or statutory language, although it does now appear in Art. IX, §2, of the new Illinois Constitution of 1970. Much more commonly used are the equivalent phrases "excise tax" or "franchise, privilege and occupation tax". Inasmuch as the real issue in the cases is simply one of whether or not the tax is a "property tax", the use of the more generalized term "nonproperty tax" seems preferable, and avoids the sometimes awkward problem of fitting a new form of tax into the traditional definition of an "excise" or a tax on "franchises, privileges or occupations".

would be equivalent to conceding that much has been said about absolutely nothing. More important, it would eradicate an established criterion for distinguishing a valid tax from an invalid tax,—without substituting anything in its place other than vague generalities. If the discriminatory tax created by Article IX-A is permitted to stand, then the equal protection clause will have been emasculated as a means of protecting corporate taxpayers against arbitrary state action in the matter of taxation.

While various definitions can be found for the terms “property” tax and “nonproperty” (or “excise”) tax, the most useful is probably that offered by Professor Sholley in a frequently cited article published in 1937.⁽¹²⁾ “The primary question,” he says, “is whether the tax is payable *because* the taxpayer is an incorporated group enjoying the special privileges which attend the transaction of business in that form, or *because* the taxpaying corporation owns property . . .”. (emphasis in original) The Supreme Court of Illinois has embraced a similar definition:

“Taxes are generally defined as coming within two classes, property taxes and excise taxes . . . and excise taxes are variously denominated, such as occupational, licenses, privilege, franchise, and other types which are distinguished from property taxes by one being a tax directly upon the property itself, and the other as a charge for a privilege arising from the use of the property itself, generally intangible in nature.” *Village of Lombard v. Illinois Bell Telephone Company*, 405 Ill. 209, 213 (1950).

⁽¹²⁾ Sholley, *Corporate Taxpayers and the Equal Protection Clause*, 31 Ill. L.R. 463 and 567 (1937), at p. 581.

The difference between the two forms of taxation is readily apparent from their definitions. The significance to be attached to that difference is, of course, a more subtle problem.

Quite apart from its role in fourteenth amendment cases the dichotomy between property and nonproperty taxes has played an enormously important role in the history of American taxation.

The distinction is reflected in almost all of the state constitutions. These commonly require a high degree of uniformity with respect to property taxes, while at the same time authorizing liberal classification with respect to nonproperty taxes. Accordingly, almost every new form of taxation devised by a state legislature has been immediately confronted with a challenge requiring that it be characterized as a nonproperty tax if it is to survive. The great bulk of state court litigation, of course, has centered on the income tax,—and particularly the tax on corporate net income. A detailed analysis of these cases can be found in Newhouse, *Constitutional Uniformity and Equality in State Taxation* (Ann Arbor, 1969), at page 690, et seq., and need not be repeated here. See also, Annotation, *What is a Property Tax as Distinguished from Excise, License and Other Taxes?* 103 A.L.R. 18 (1936).

An analogous problem with respect to federal taxes is presented in the United States Constitution. Article I, § 2, Cl. 3, requires that "direct" taxes be apportioned among the several states according to population. On the other hand, Article I, § 8, Cl. 1, specifies that "duties, imposts and excises" need only be uniform throughout

the United States, thus permitting "reasonable" classification. (See *Knowlton v. Moore*, 178 U.S. 41, 84 (1900)).

Inasmuch as the term "direct tax" encompasses only taxes on property and the now obsolete capitation or poll tax (*Hylton v. United States*, 3 Dall. 171 (1796)) this Court has on many occasions been called upon to determine whether a non-apportioned tax imposed by Congress is or is not a property tax,—essentially the same characterization problem as is presented by the equal protection decisions with respect to state taxes.

In a number of early cases such as *Hylton v. United States*, 3 Dall. 171 (1796); *Pacific Insurance Co. v. Soule*, 7 Wall. 433 (1869); *Veazie Bank v. Fenno*, 8 Wall. 533 (1869); and *Scholey v. Rew*, 23 Wall. 331 (1875), the Court embraced a narrow view of what constitutes a direct tax, and hence a broad view of the powers of Congress in the area of taxation. On the other hand, in *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895), op. on reh. 158 U.S. 601 (1895), the Court determined that the federal income tax imposed by the Act of 1894 was a tax on property, and hence a direct tax invalid for lack of apportionment. Subsequently, in *Knowlton v. Moore*, 178 U.S. 41 (1900), and *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), the Court held, respectively, that a federal tax on inheritances and a federal tax on corporate income were not direct taxes.

For purposes of the case now at bar, the most important of the "direct tax" cases, unquestionably, is *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), especially since this Court took special pains to analogize the issue before it to one involving the validity of a state tax under the fourteenth amendment (220 U.S., at pp. 158, 161).

In *Flint v. Stone Tracy* this Court upheld the validity of a federal tax levied exclusively on the income of corporations, and for that reason the State of Illinois, at p. 17 of its brief, purports to place great reliance upon it. The real significance of the case, however, lies in the fact that the Court was able to reach that result only after first characterizing the tax as an excise tax, and *not* a property tax. That characterization issue is the key to the case, and it is the subject of a lengthy and enlightened discussion at pages 147-152 of the opinion. Thus, *Flint v. Stone Tracy* strongly supports Lake Shore's position, and not that of the State,—for an ad valorem tax on personal property very clearly is a property tax, and not an excise.⁽¹²⁾ (The State reluctantly, and somewhat deviously, concedes as much in footnote 5 at page 18 of its brief.)

As was made clear by this Court in *Flint v. Stone Tracy*, the proper characterization of a state tax is frequently crucial to a determination of its validity under the equal protection clause. This is further illustrated by a great many cases, such as *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926); *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535 (1934); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928); and *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283 (1898).

The last mentioned case was one of those referred to by this Court in *Flint v. Stone Tracy*, and is considered a

⁽¹²⁾ Similarly, in *Thorpe v. Mahin*, 43 Ill. 2d 36, 42 (1969), the Illinois Supreme Court upheld a differential tax on corporate income only after a preliminary finding that the tax was not a property tax,—thereby overruling a prior holding to the contrary in *Bachrach v. Nelson*, 349 Ill. 579 (1932).

leading case in the fields of both constitutional law and taxation. In *Magoun*, this Court upheld the Illinois Inheritance Tax Law as against a claim that its exemption and graduation features constituted a denial of equal protection. The Court commenced its analysis of the problem by observing (at p. 288) that prior decisions had established that a tax on inheritance is *not* a property tax, but rather a tax on the "privilege" of acquiring property through inheritance.

The importance of this characterization is evident from the Court's repeated references to it throughout the opinion. For example, at p. 298: "The reasoning of appellant (taxpayer) is based on the view that the tax is one on property, instead of one on the succession as seen by the supreme court of the state." And the dissenting justice says (at p. 302): "It seems to be conceded that if this were a tax on property, (it) could not be sustained."

The reason the tax could not be sustained as a property tax, of course, is that then the classification (the varying tax rates and the differential exemptions) would necessarily depend on the character of the owner of the "property" (i.e., the estate inherited by the taxpayer). That is to say, if the owner (the devisee or legatee) were a stranger to the decedent he would be compelled to pay a larger tax on a given value of "property" (inheritance) than would a close blood relative of the decedent. That is precisely the sort of classification which the equal protection clause does not permit in the case of a property tax. Yet that is precisely the sort of classification which Article IX-A superimposes on the personal property tax provisions of the Revenue Act of Illinois.

Many of the other cases upon which the State relies in its brief are likewise dependent entirely upon the Court's characterization of the tax in question as a nonproperty tax, and hence they have no application here. Among these is the important case of *Home Insurance Co. v. New York*, 134 U.S. 594 (1890). In its subsequent decision in *Pacific Co., Ltd. v. Johnson*, 285 U.S. 480, 489 (1932), this Court explained the true rationale of *Home Insurance*, emphasizing the importance of the "franchise tax" characterization. Other cases cited by the State and falling into this category are: *Lawrence v. State Tax Commission*, 286 U.S. 276 (1932); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342 (1916); and *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527 (1931).

The Governor of Illinois and its Attorney General are not, of course, the first to have argued that the validity of a tax ought not be made dependent upon a mere matter of words. However, at least one prominent commentator (who to some extent shares that view) has frankly acknowledged that this sort of criticism is essentially self-serving,—that the real concern of those who advance it is a fear that the court will put the wrong "label" on a tax which they wish to see enacted. Newhouse, *Constitutional Uniformity and Equality in State Taxation* (Ann Arbor, 1959), at p. 761-2.

It may well be that some courts in the past have been overly eager to characterize newly enacted taxes as "property" or "direct" taxes. Yet, the occasional misapplication of an otherwise useful rule of law hardly furnishes a sound reason for abolishing the rule altogether,—especially when no alternative rule is suggested other than hopelessly vague generalities.

Lake Shore suggests that the traditional distinction between property and nonproperty taxes reflects a real and meaningful difference. Ad valorem property taxes are truly different from other taxes. Unlike all other forms of taxation, they are imposed on the taxpayer (i.e., the property owner) quite without regard to any action or inaction on his part. The mere fact of ownership,—that and nothing more,—is both necessary and sufficient to establish liability. A corporation does not “own” property any differently than a natural person “owns” property. The State of Illinois cannot deprive a corporation of its property to any greater extent than it can deprive a natural person of his property. In either case, just compensation must be paid. Why then should the State of Illinois be privileged to exact a higher tax on ownership from a corporation than it does from a natural person, where both own identical property, put to the same use? Classification on the basis of ownership is neither rational nor related to the object of the tax. See *Morey v. Doud*, 354 U.S. 457, 466 (1957).

At this point it is appropriate to emphasize that the authorities upon which Lake Shore relies are those concerned with property tax classifications based solely upon the corporate characteristics of the property owner.

Lake Shore readily concedes that a less precise test of reasonableness applies where the classification is predicated upon the nature of the property, the use to which it is put, or its location. The distinction was long ago explicitly recognized by Justices Field and Sawyer in the *California Railroad Tax* cases (13 Fed., at 737; 18 Fed., at 408 and 432), and by this Court in *McHenry v. Alford*, 168 U.S. 651, 666 (1898). Where the classification is based upon some ground other than mere ownership, this Court

has permitted a very broad range of legislative discretion. See, e.g., *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 191 (1945); *Madden v. Kentucky*, 309 U.S. 83 (1940).

A number of the cases relied upon by the State of Illinois in its brief are concerned with property tax classifications not based upon ownership, and hence they have no pertinence to the case now at bar. Among these are *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232 (1890); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *Great Atlantic and Pacific Tea Co. v. Grosjean*, 301 U.S. 412 (1937); *New York Rapid Transit Co. v. City of New York*, 303 U.S. 573 (1938); and *Tigner v. Texas*, 310 U.S. 141 (1940).

Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232 (1890), is an important case because it constitutes the first occasion on which this Court undertook to determine the applicability of the equal protection clause to a state taxing statute. The Court upheld the statute which imposed an ad valorem tax on bonds and other securities issued by corporations at a rate effectively higher than that imposed on other "moneyed securities". That classification, it should be noted, was not based upon the ownership of the taxable property, but rather upon supposed differences in the nature of the property itself.

Bell's Gap has been cited with approval in hundreds of subsequent decisions, most frequently for its pronouncement that the equal protection clause does not compel the states to adopt an "iron rule" of equal taxation. The opinion, however, also contains other language which is of even greater relevance to the case now at bar (p. 237):

“(A state may) if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions, it may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, *so long as they proceed within reasonable limits and general usage*, are within the discretion of the state legislature, or the people of the state in framing their constitution. *But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments*, might be obnoxious to the constitutional prohibition.” (emphasis added)

Each of the examples given of permissible classifications and exemptions is based upon the nature of the property itself or the use to which it is put,—not upon ownership.

Of course we cannot know with certainty just what Justice Bradley had in mind when he referred to “hostile discriminations unknown to the practice of our governments.” There is however, very good reason to suppose that the Court had in mind classifications based solely upon ownership,—or at least upon corporate ownership. Such classifications were “unknown to the practice of our governments”,—both in the United States⁽¹⁴⁾ and in Eng-

⁽¹⁴⁾ The status of property taxation at the beginning of our nation's history can best be gathered from the apparently complete collection of state constitutional provisions and statutes on that subject contained in the Report to the House of Representatives on Direct Taxation, dated December 13, 1796, prepared by Oliver

land.⁽¹¹⁾ Furthermore, *Bell's Gap* was argued only four

Wolcott, Jr., Secretary of the Treasury, and published in *American State Papers, Finance*, Vol. I, p. 414. Examination of these documents reveals no instances of exemption based solely upon the nature of the property owner. Standard texts current around the time of the *Bell's Gap* opinion give no indication that any such practice had developed during the 19th Century, other than the California Constitutional provision invalidated in the *San Mateo* and *Santa Clara* cases. See, e.g., Ely & Finley, *Taxation in American States and Cities* (N.Y., 1888); Gray, *Limitations of the Taxing Power* (1906), pp. 656-9.

One apparent exception should be noted. Occasionally a statute will confer an exemption upon the "property of" educational, charitable, religious or governmental institutions. While seemingly based upon mere ownership, the courts have invariably held that the real basis of these exemptions is *use*, inasmuch as the legislature assumed that all property of these institutions would be used for their public or beneficent purposes. See, e.g., *Public Building Comm'n. v. Continental Illinois Nat'l. Bank & Trust Co.*, 30 Ill. 2d 115, 122 (1963); *Associated Hospital Service, Inc. v. City of Milwaukee*, 109 N.W. 2d 271 (Wisc., 1961); *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W. 2d 635, 652-3 (Mo., 1965).

⁽¹²⁾ Prior to the date of the *Bell's Gap* decision there had been two major codifications of English property tax law, embodied, respectively, in the statutes of 1692 (4 Wm. & Mary, Ch. 1), and 1797 (38 Geo. III, Ch. 5). 10 Halsbury's Statutes of England, p. 171 (1929). The coverage of the two statutes was almost identical. Section 3 of the Act of 1797 imposed ad valorem personal property taxes on "all and every person and persons, bodies politick and corporate . . ." Section 4 of that Act imposed real estate taxes on "all and every manors, messuages, lands and tenements . . . as well within ancient demesne and other liberties and privileged places, as without . . . and all and every person or persons, bodies politick and corporate, guilds, mysteries, fraternities and brotherhood, whether corporate or not corporate . . . shall be charged with as much equality and indifference as is possible . . ." (emphasis added). Sections 25 and 26 of the Act of 1797 conferred exemptions only upon certain universities, hospitals and almshouses.

The coverage of earlier property tax statutes appears to have been equally broad. See, for example, 1 Wm. & Mary, Ch. 20, §§ 2 and 4 (1688). For the history of the English property tax, see generally, Dowell, *History of Taxation and Taxes in England* (London, 1888), Vol. 3, pp. 67-123. The principle of universal coverage was established as early as the 12th Century. Mitchell states that "everyone

years after the *California Railroad Tax* cases had been before the Court, and at a time when the issue of corporate power was very much in the public mind. Justice Field was still on the bench, and he concurred in the *Bell's Gap* opinion. With his firmly held and widely known views on the subject of property tax discrimination against corporate ownership, it seems most unlikely that he would have lent his support to any decision which even remotely questioned those views.

In an obvious attempt to create a straw man, the State of Illinois (at p. 16 of its brief) seeks to attribute to Lake Shore a position which is considerably broader than the position Lake Shore has actually adopted in this case. Lake Shore's contention has consistently been that a state may not discriminate against corporate ownership with respect to an ad valorem property tax. In the case at bar, therefore, it is quite unnecessary to determine whether a broader proposition also holds true,—i.e., that for purposes of an ad valorem property tax *no* classification of *any* kind may be predicated upon ownership.

While Lake Shore does believe that the broader proposition is indeed a correct statement of the law, it also recognizes that doubt may have been created by *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), even though this Court in that case took some pains to assert that the classification which it approved therein was not in truth based upon mere ownership (358 U.S., at p. 530).

had to contribute . . . all members of all classes were liable." Mitchell, *Taxation in Medieval England* (Painter, ed., Yale U. Press, 1951), at p. 116.

In *Allied Stores* this court upheld the validity of an Ohio personal property tax statute which exempted certain categories of property only when owned by nonresidents of Ohio,—thereby seemingly using an ad valorem tax base for the purpose of discriminating against resident ownership. While the majority opinion expressly disclaims any intention of overruling *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), yet, as the concurring justices pointedly observed (p. 530-31), it is not easy to accept the majority's attempted distinction,—namely that in *Allied Stores*, but not in *Glander*, it is possible to conceive of some state policy which might rationally justify the differential even though that policy is not expressed in the statute itself and is not evident from its legislative history.

E. There Is No Rational Basis for the Discriminatory Classification in the Case at Bar.

The State of Illinois purports to read *Allied Stores* as though it overruled not merely *Glander*, but the *Quaker City Cab* case as well. No longer would there be any readily ascertainable rule by which one can distinguish an arbitrary classification from a reasonable one. Instead, it will be sufficient merely to persuade a court that the legislature *might* have had in mind the effectuation of some permissible aspect of public policy, rather than being motivated solely by a malevolent and willful intention to discriminate against one class of taxpayers. By this test, virtually any discriminatory scheme could seemingly pass muster;—except, apparently, the ones stricken down in *Glander*, in *Reserve Life Insurance Co. v. Bowers*, 380 U.S. 258 (1965), in *WHYY, Inc. v. Borough of Glass-*

boro, 393 U.S. 117 (1968), and except, also, Lake Shore submits, the one involved in the instant case.

Lake Shore does not believe that *Allied Stores* can properly be interpreted in the manner urged by the State of Illinois. But even if construed in a way most unfavorable to Lake Shore, there is simply no plausible means of rationalizing the discriminatory pattern established after adoption of Article IX-A. Each of the ingenious rationalizations offered by the State is squarely refuted by the facts and also by the elaborate statement of legislative intent contained in the Official Argument in favor of Article IX-A (App. A),—a statement which is so detailed that it leaves no room for speculation as to additional unstated motives.

The State advances three separate arguments in support of its position that the discrimination here is reasonable:

1. The personal property tax on corporations is claimed to be in reality a tax on the privilege of doing business in corporate form (State's brief, at p. 15-19). The Explanation and the Official Argument in favor of Article IX-A contain nothing whatsoever from which such an inference can be drawn. Furthermore, as has been demonstrated, the courts have consistently treated property taxes and nonproperty taxes (including franchise and privilege taxes) as being mutually exclusive. This is not to deny that corporations are different from natural persons. Of course they are, and that difference will justify many differential forms of taxation. But the one form of differential it will *not* justify is a differential in ad valorem property taxation.

2. The second rationalization advanced by the State is tied to a suggested concept of "gradualism" (State's

brief at p. 14). A similar argument is apparently sought to be raised in the Petition for Certiorari filed on behalf of the Cook County tax officials in Case No. 71-691. It is said that the abolition of personal property taxation upon individuals is but a step toward the ultimate abolition of all personal property taxation in Illinois, and therefore, presumably, Lake Shore should suffer in silence the denial of its constitutional right to equality because it is, after all, only a temporary deprivation.

Lake Shore is baffled by this argument. So far as it can ascertain, the doctrine of "gradualism" is unknown in American constitutional law. No authority is cited to support it, and presumably none exists.

Moreover, the argument is constructed upon a premise which in all probability is incorrect,—that Article IX, §5(c), of the new Illinois Constitution of 1970 will require total abolition of all personal property taxation by 1979. Although the language of this section does appear, upon superficial examination, to require that result, it is now generally acknowledged among Illinois constitutional authorities that the language chosen by the Constitutional Convention is almost certainly inadequate to accomplish the apparently intended purpose. Indeed, it will probably have the opposite effect of guaranteeing the preservation of personal property taxation in perpetuity.⁽¹⁰⁾

⁽¹⁰⁾ One line of argument leading to this conclusion is developed by Kamin, *Constitutional Abolition of Ad Valorem Personal Property Taxes: A Looking Glass Book*, 60 Ill. Bar Jrnl. 432 (1972). An even more persuasive argument could probably be based upon the impossibility of enforcing (or even understanding) the mandatory replacement requirements of §5(c). In all likelihood, the "requirement" for abolition is not severable from the replacement requirements. The text of §5(c) is reproduced at p. 4 of the State's brief.

3. The final argument advanced by the State in support of its position that the discrimination evolving from Article IX-A is rational involves a contention that the personal property tax is more easily administered with respect to corporations, and that this ease of administration justifies the discriminatory treatment (State brief at p. 13-14). The ingenuity of this argument is striking, and it deserves an answer.

The personal property tax has been around for a very long time, and almost from the date of its inception it has been subject to both maladministration and public resentment of truly monumental proportions. On this point there appears to have been agreement in every age and in every jurisdiction where the tax has been in effect.⁽¹⁷⁾

⁽¹⁷⁾ Seligman, *Essays in Taxation* (10th ed., 1931) p. 22 et seq. summarizes the vast literature on the evils of personal property taxation. See also Netzer, *Economics of the Property Tax* (Brookings Inst., 1966), Ch. VI; and authorities cited at fn. 18 infra. Professor Simeon E. Leland, the distinguished authority on state and local taxation, has recently stated that "the personal property tax in Illinois as elsewhere—is a scandal." Memorandum on the Improvement of the Property Tax, in Report of the Governor's Revenue Study Commission 1968-69, at p. 175 (State of Illinois, 1969). His words are reminiscent of those contained in an 1886 Report of the Revenue Commission to the Illinois General Assembly, at p. 8: "debauching to the conscience and subversive of the public morals—a school for perjury, promoted by law."

Adam Smith expressed an additional thought on the problems of personal property taxation:

"The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax-gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort, by the

So far as Lake Shore can ascertain, however, the State of Illinois (at p. 13 of its brief) is the very first ever to have suggested that the source of these problems lies in the difficulty of locating a particular *class of property owner* (i.e., "individuals"). All other commentators, including the most respected authorities in the field, seem to be in unanimous agreement that the problems of personal property taxation are attributable entirely to the inability or unwillingness of taxing officials to locate and assess certain *classes of property*.⁽¹⁸⁾ This is particularly true of so-called "invisible" property, consisting mainly of intangibles, which comprises the great bulk of property

terror of such aggravation, some present or perquisite to himself. The uncertainty of taxation encourages the insolence and favours the corruption of an order of men who are naturally unpopular, even when they are neither insolent nor corrupt." (The Wealth of Nations, Book V, Ch. II, Part II (Mod. Lib. ed., p. 778).

⁽¹⁸⁾ Netzer, Economics of the Property Tax (Brookings Inst., 1966), Ch. VI; Netzer, "Property Taxes", in International Encyclopedia of the Social Sciences (1968), Vol. 15, p. 548; Property Taxation USA (Lindholm, ed.), Proceedings of a Symposium Sponsored by Committee on Taxation, Resources and Economic Development at the University of Wisc., 1965, esp. at pp. 7, 122; The Property Tax and its Administration (Lynn, ed.), Proceedings of a Symposium Sponsored by Committee on Taxation, Resources and Economic Development at the University of Wisc., 1967, esp. at pp. 15 et seq.; Tax Institute of America, The Property Tax: Problems and Potentials (Princeton, 1967), esp. at pp. 317-366; Buehler, Personal Property Taxation, in Property Tax Symposium (Tax Policy League, 1940), at pp. 128-132; Haig, History of the General Property Tax in Illinois (Univ. of Ill. Studies in the Social Sciences, Vol. 3, 1914) at pp. 144-165; Leland, The Classified Property Tax in the United States (1928), esp. at pp. 401-04; Jensen, Property Taxation in the United States (Chicago, 1931), at pp. 265-80; Ely & Finley, op. cit. fn. 14 supra, at pp. 152-59, 177-82, 192-201.

in a modern industrial society. It also applies, however, to household goods and personal effects which, in the absence of any tradition of effective self-assessment, cannot be located by the assessor without intolerable invasions of personal privacy.⁽¹⁹⁾ The problem is further complicated by the existence of sophisticated and expensive industrial equipment which cannot possibly be appraised by assessors with any tolerable degree of accuracy.

In recognition of these realities, most states long ago undertook at least partial abolition of personal property taxation; and invariably this process has progressed in stages, starting with the most troublesome and least productive classes of property. See, e.g., Advisory Commission on Intergovernmental Relations, *The Role of the States in Strengthening the Property Tax* (Gov't. Printing Office, 1963), Vol. 1, p. 30-36; Netzer, *Economics of the Property Tax* (Brookings Inst., 1966), p. 140 et seq.; U.S. Bureau of the Census, *Census of Governments 1967*, Vol. 2, *Taxable Property Values*, p. 4-7.

It is quite true that in Illinois (and no doubt in other jurisdictions as well) corporations do pay a disproportionately large share of personal property tax as com-

⁽¹⁹⁾ In his Report of 1796 (fn. 14 supra), at p. 439, Secretary of the Treasury Wolcott strongly advised against the imposition of a federal ad valorem tax on personalty for the reason that: "... direct taxes on these objects ... are impolitic, unequal and delusive ... They are either arbitrary, or they require an inquisition into the circumstances of individuals, to which free governments are incompetent ..."

Compare Adam Smith's observation (*The Wealth of Nations*, Mod. Lib. Ed., p. 800): "An inquisition into every man's private circumstances, and an inquisition which, in order to accommodate the tax to them, watched over all the fluctuations of his fortune, would be a source of such continual and endless vexation as no people could support."

pared to natural persons. But no one before has ever suggested that this is because corporations are easier to find than are individuals.⁽²⁰⁾ The true explanation for this situation, rather obviously, is to be found in two facts: (1) business property tends to be more "visible" than the property (mainly intangibles) owned by natural persons, and most business is conducted in corporate form; and (2) it is less objectionable politically to enforce collection against corporations than against natural persons because only natural persons possess the power to vote the tax collector out of office. (As is noted in the Official Argument (App. "A"), no attempt at all is made to enforce the personal property tax against the three million residents of Chicago who are not engaged in business.)

Where the taxing officials are willing to do so, it is a relatively simple matter to assess a personal property tax upon motor vehicles inasmuch as they are registered with the state, and this is equally true whether the vehicle is owned by a corporation or a natural person. Beyond that, there are two categories of personal property which notoriously bear a highly disproportionate share of the burden: (1) the property of public utilities (which is commonly understood to comprise somewhere between one-half and two thirds of the total personal property tax yield in almost every Illinois county), and (2) farm property. Public utilities, of course, are invari-

⁽²⁰⁾ Neither the Illinois statute nor the Illinois Supreme Court decision referred to by the State at p. 14 of its brief is concerned with personal property taxes. So far as Lake Shore is aware, there is no reported decision in which an Illinois corporation, or one licensed to do business in the state, has been dissolved or excluded by reason of nonpayment of personal property taxes.

ably operated in corporate form, whereas farms are most commonly owned by natural persons. It is not the form of ownership which determines their vulnerability to the assessor, but rather the relatively high visibility of the assets used in these particular businesses.

Because of the difficulties inherent in the assessment process, and because of the long standing tradition of maladministration, it is undoubtedly true that *all* personal property assessments are essentially arbitrary. The Official Argument sounds this theme with refreshing frankness and in bone-chilling detail. There is not a word in that document which suggests even remotely that the evils of personal property taxation, so vividly described therein, are any less prevalent when the tax is levied exclusively upon corporations. That Official Argument constituted an invitation to the voters of Illinois to lift this burden of evil off of their own shoulders while leaving it astride the shoulders of corporate property owners. Needless to say, that invitation was gratefully accepted.

The State's contention that the personal property tax will be easier to administer if "individuals" are exempted from the tax is further reduced to absurdity if even a moment's thought is given to the new and very substantial administrative problems that would necessarily be created if the State's position were to be sustained by this Court.

First of all, every corporation owning a substantial amount of personal property will endeavor to avoid the tax by transferring title thereto into the name of an individual nominee, or "straw man". No doubt this rather simple-minded device will eventually be foreclosed,—

either through judicial decision, constitutional amendment, or, possibly, administrative regulation. But the need for continuous policing of this avoidance mechanism will certainly require a substantial amount of administrative effort.

When and if the nominee device becomes impractical, corporations will surely work out sale-and-leaseback plans in which the "individual" lessor will have a substantial economic interest in the personal property so that he will have to be recognized as the owner for property tax purposes. The tax saving should be sufficient to provide an excellent financial return to both lessor and lessee.

In addition, every time an item of personal property changes hands to or from corporate ownership a change in its tax status will occur. Keeping track of these will pose a major administrative problem.

The most serious administrative problem stemming from the effectuation of Article IX-A, however, will center around the definition of "individual". For example, are trusts and estates "individuals"? Does it depend on whether the trustee or executor is a corporation? If so, what is the status where there is a corporate co-trustee serving along with one or more individual co-trustees? Or does taxable status depend on whether the ultimate beneficiary of the estate or trust is an individual? And if that is the case, what happens where the beneficial interests are contingent, or where the trust contains discretionary provisions?

A similar set of problems exists for partnerships.

From what has been said, it appears perfectly obvious that large staffs of administrators, and litigators, will be

kept busy for years if the State's position should be upheld. The entire argument of "administrative ease" is a sham, conceived by the State in a desperate effort to find some rational justification for the discrimination created by Article IX-A. It should be brushed aside by this Court just as was the similar rationalization advanced by the State of New Jersey in *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 120 (1968).

II.

THE INVALIDATION OF ARTICLE IX-A OF THE ILLINOIS CONSTITUTION BY THE ILLINOIS SUPREME COURT WAS ERRONEOUS AND IN ITSELF VIOLATIVE OF THE FOURTEENTH AMENDMENT.

A. Preliminary Statement.

The Illinois Supreme Court held that "the discrimination produced" by Article IX-A did violate the equal protection clause, thus sustaining the position urged by Lake Shore and adopted by the trial court. The Supreme Court, however, then concluded that "it is Article IX-A which must fall",—not the personal property taxing provisions of the Revenue Act itself (49 Ill. 2d 137, at p. 151; App. 32). This determination (which reversed Judge Dahl's ruling), had the consequence of leaving the Revenue Act unaffected by Article IX-A, and thereby retained ad valorem personal property taxation on all Illinois taxpayers, individuals and corporations alike. It also had the consequence of wholly frustrating the will of the People of Illinois, who had approved Article IX-A by an overwhelming margin at a referendum held in November, 1970.

The decision necessarily means that neither Lake Shore nor the class of corporations which it seeks to represent

will receive any benefit from Lake Shore's successful challenge to the unconstitutional taxing scheme.⁽²¹⁾

While it can hardly be denied that this "Illinois solution" for the equal protection problem does eliminate the discrimination, it also has other consequences which, Lake Shore suggests, raise serious federal constitutional questions,—questions which are fairly comprised within the issues upon which certiorari was granted in Nos. 71-685 and 71-691.⁽²²⁾

The decision of the Illinois Supreme Court is incompatible with the fourteenth amendment in at least two respects: (a) Since Article IX-A is a constitutional amendment which neither imposes a tax nor requires a tax to be imposed, it is not the "state action" which is proscribed by the fourteenth amendment,—only the Revenue Act, which actually imposes the tax in a discriminatory manner, is violative of the equal protection man-

⁽²¹⁾ Restoration of the personal property of individuals to the tax base will have only a negligible effect on the tax bills of corporations. See Brief of Lake Shore in Opposition to Appellees' Consolidated Motion to Strike, at p. 2, fn. 2.

⁽²²⁾ A question substantially the same as that raised here was sought to be raised by Lake Shore in its Jurisdictional Statement filed in connection with its appeal to this Court from the Illinois Supreme Court (No. 71-674). That appeal was dismissed for "want of jurisdiction" on April 3, 1972. It is Lake Shore's understanding that dismissal for want of jurisdiction does not constitute a decision on the merits, and that the order merely signifies this Court's belief that the constitutionality of the Revenue Act itself was not deemed by the State Supreme Court to be in issue so as to confer appellate jurisdiction under 28 U.S.C. §1257(2). See *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 651 (1942). Hence Lake Shore analogizes its present position to that of a Respondent who had made no initial attempt to seek review of the lower court decision.

date; and (b) by depriving corporations of the economic benefit to be gained from asserting and vindicating their equal protection rights, such rights have been impermissibly impaired or "chilled".

B. Article IX-A Does Not Offend The Equal Protection Clause.

Article IX-A states merely that "notwithstanding any other provision of this constitution, the taxation of personal property by valuation is prohibited *as to individuals.*" (emphasis in original). In no sense is this prohibition in constitutional conflict with any other provision of the Illinois Constitution of 1870. That Constitution, as it existed prior to the adoption of Article IX-A, did not mandate the imposition of personal property taxes on *any* class of taxpayer. It simply required (Article IX, §§1 and 9) that any property taxes which the General Assembly might choose to levy or authorize must be imposed uniformly so that "every person and corporation shall pay a tax in proportion to the value of his, her or its property." (The full text of Article IX, §1, of the Illinois Constitution of 1870 is set out at p. 3 of the State's brief).

If viewed separate and apart from Section 18 of the Revenue Act itself (which directs that *all* real and personal property in the state be taxed), the constitutional pattern presented by the interaction of Articles IX and IX-A is innocuous. It might well be paraphrased as follows:

"If any tax shall be imposed on property, that tax shall be levied uniformly so that every person and corporation shall pay a tax in proportion to the value

of his property, except that the personal property of individuals shall not be taxed."

Consistent with this pattern, and with the equal protection clause, the legislature would be free to impose property taxes only on real estate. In other words, Article IX-A, standing alone, in no way violates the equal protection requirement. It neither imposes any tax, nor does it compel any unlawful discrimination.⁽²¹⁾ That Article does not even constitute state action,—let alone state action which denies the equal protection of the laws to any person.

The instrument by which the unlawful discrimination is practiced is §18 of the Revenue Act. That statute, and that statute alone, imposes a tax. While it still nominally purports to tax *all* personal property, the necessary effect of the adoption of Article IX-A was to preclude the imposition of the tax on the personal property of individuals. Accordingly, the statute now imposes a tax only on the personal property of non-individuals.—a form of discrimination prohibited by the equal protection clause.

The "Illinois solution" of invalidating Article IX-A is more than merely unique. The striking down of the constitutional provision, rather than the Revenue Act, is contrary to the commonly accepted understanding that a constitution is to be accorded higher status than a mere

⁽²¹⁾ For this reason, the case at bar is readily distinguishable from cases such as *Frost v. Corporation Commission*, 278 U.S. 515, 525-6 (1929), and *Truax v. Corrigan*, 257 U.S. 312, 341-2 (1921), wherein the amendatory law, read in conjunction with the law previously in effect, necessarily created an invalid classification thereby causing the amendment to be invalidated.

statute. See *Reynolds v. Sims*, 377 U.S. 533, 584 (1964), where this Court said:

"State constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated."

Moreover, the Illinois Supreme Court made not even a pretense of attempting to ascertain the intention of either the People or the legislature,—i.e., whether, had they been aware of the unconstitutionality of the discrimination, they would have chosen to remove the tax from all classes of taxpayers, or whether they would have chosen instead to forego Article IX-A in its entirety.⁽²⁴⁾

Interestingly enough, the Illinois Supreme Court did not treat the issue as one of the severability of Article IX-A, either with respect to the remainder of the constitution itself, or with respect to the Revenue Act. Upon reflection, however, it becomes apparent that severability could not be employed in that court's analysis because the "amendment" was at the state constitutional level while the law purportedly affected was of inferior stature,—i.e., a mere statute. This being so, the "standard" approach used in determining whether an amendment alone falls, or whether the entire law as amended is to be invalidated (exemplified by the *Frost* and *Truax* cases, cited at fn. 23 supra), would be inappropriate.

⁽²⁴⁾ The trial judge in the *Lake Shore* case had stated (Rec. 46): "There is no question in the minds of anybody that the People of Illinois would have overwhelmingly passed it (Art. IX-A) without the words 'as to individuals' . . . If the words 'as to individuals' were left out, and the People voted on the question of abolition of all personal property taxes, the vote would have been overwhelming."

The only "reason" given by the Illinois Supreme Court for its holding is in truth no reason at all, but merely a statement devoid of any meaning other than as a restatement of its conclusion:

"We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the fourteenth amendment. *Apart from that discrimination, the validity of the Revenue Act is not challenged and we hold that it is Article IX-A which must fall.*" (emphasis added)

Under these circumstances, the only plausible inference which can be drawn is that the Illinois Supreme Court invalidated Article IX-A simply because it thought, erroneously, that such a result was required by the equal protection clause. Even if it be assumed that the form of relief from an equal protection violation is a question of state law, this Court has held that an interpretation of state law by a state court acting under compulsion of federal law erroneously understood is not controlling in federal courts. *Tipton v. A.T. & S.F. Ry. Co.*, 298 U.S. 141, 151 (1936); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 120 (1924). Cf. *State Tax Comm'n. of Utah v. Van Cott*, 306 U.S. 511, 514 (1939).

There is nothing in the opinion of the Illinois Supreme Court which offers the slightest clue as to the reasoning by which that court reached its conclusion that Article IX-A (rather than the Revenue Act itself) was violative of the equal protection clause. Even though that determination might ordinarily be deemed a matter of state law controlling upon this Court (cf. *Morey v. Doud*, 354 U.S. 457, 469-70 (1957), wherein this Court honored the Illinois Supreme Court's *express finding* as to legislative intent), Lake Shore submits that such controlling effect

ought not be accorded a state court determination which is based upon no reason at all, and is nothing more than an ultramontane pronouncement. Hence, this Court should be free to make its own determination of what the state law is. *Guinn v. United States*, 238 U.S. 347, 366 (1915).

Finally, the "Illinois solution" only superficially grants equality of treatment to corporations. In 1970, for example, Cook County corporations paid \$126,000,000 in personal property taxes, whereas all other taxpayers in the county paid only \$15,000,000. (These figures, while apparently unofficial, are set forth in the Amended Petition for Writ of Certiorari filed in No. 71-685 by the Attorney General of Illinois, at page A49).

In reality, therefore, by voiding Article IX-A and thus salvaging the personal property tax, the Illinois Supreme Court simply preserved the *status quo ante*, and erroneously sought to cure an equal protection violation by the prohibited measure of the "reimposition of inequalities". *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

C. Enforcement Of Rights Protected By The Equal Protection Clause Will Be Seriously Impaired If The Holding Of The Illinois Supreme Court With Respect To The Invalidity Of Article IX-A Is Allowed To Stand.

If constitutionally guaranteed rights are to be honored only in form and not in substance the right supposedly guaranteed will soon disappear. In this case the affected class happens to consist of corporations, but if countenanced here the application of the "Illinois solution" to equal protection problems of other groups will not be long in coming.

In *Harman v. Forssenius*, 380 U.S. 528, 540 (1965), this Court said:

"It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. . . . 'Constitutional rights would be of little value if they could be . . . indirectly denied,' . . . or 'manipulated out of existence.'"

Lake Shore, of course, recognizes that *Harman* was concerned with the right to vote. Voting rights, along with the first amendment rights of free expression and the fourteenth amendment rights of freedom from racial discrimination, are certainly among those "sensitive and fundamental personal rights" which will be subjected to "stricter scrutiny" by this Court. (*Weber v. Aetna Casualty & Surety Co.*, U.S., 92 S. Ct. 1400, 1405 (1972)). Where such personal rights are at stake this Court has been keenly alert to the danger that their assertion may be discouraged, or "chilled", by various forms of state action: *Dombrowski v. Pfister*, 380 U.S. 479, 487, 494 (1965); *Shelton v. Tucker*, 364 U.S. 479, 487-8 (1960); *Smith v. People*, 361 U.S. 147, 155-6 (1959); *Time, Inc. v. Hill*, 385 U.S. 374, 401-2 (1967) (concurrent opinion); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969).

While fully acknowledging the priority rightfully accorded to such sensitive and fundamental personal rights, Lake Shore respectfully suggests that the effective protection of constitutionally guaranteed rights of property has also been a traditional concern of this Court.

It is perhaps not without significance that one of the authorities relied upon in *Harman v. Forssenius* was *Frost & Frost Trucking Co. v. Railroad Comm'n of*

California, 271 U.S. 583 (1926). That case involved only a property right, and in it this Court struck down a California statute which purported to deny to private motor carriers the privilege of using the state's highways unless the carrier consented to regulation as a common carrier. Under prior decisions, the fourteenth amendment had been construed so as to prohibit a state from directly compelling a private carrier to assume common carrier status.

This Court said (271 U.S., at p. 593):

" . . . constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which though in form voluntary, in fact lacks none of the elements of compulsion . . . In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden."

Of much the same import are cases such as *Ex parte Young*, 209 U.S. 123, 147-9 (1908) and *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 336-7 (1920), wherein this Court has consistently stricken down attempts by states to discourage constitutional challenges to their actions by prescribing such heavy penalties for violation that no citizen can afford the gamble of noncompliance in order to lay the necessary groundwork for a challenge.

In the instant case, of course, Lake Shore, hopefully, is not threatened either with prohibitive fines or loss of its livelihood as the price for an unsuccessful challenge to the discrimination practiced against it. Nevertheless,

the solution sanctioned by the Illinois Supreme Court is every bit as effective, if not more so, in discouraging citizens from asserting their constitutionally guaranteed rights. For even if Lake Shore and those challengers who come after it prevail in their arguments that the discrimination practiced is unconstitutional, they will have gained nothing for their efforts. It would be hard to imagine a system that could more surely stifle any inclination to enforce the constitution through private litigation.

At least where property rights are concerned, enforcement of the fourteenth amendment depends largely upon litigation brought by citizens who believe themselves aggrieved by state action. On rare occasions, perhaps, a taxpayer may challenge a discriminatory tax out of a sense of social responsibility. Human nature being what it is, however, the only incentive that normally will be adequate to insure a challenge to an unconstitutional tax and to warrant the incurring of the attendant litigation expenses is the possibility that the plaintiff will ultimately succeed in ridding himself of the tax burden.

The "Illinois solution" of fulfilling equal protection guarantees by reimposing the tax on all, if it is allowed to stand, will inevitably have the consequence of severely impairing the only real incentive taxpayers have to challenge unconstitutionally discriminatory action by state legislatures.

No doubt any equal protection violation could be "cured" equally as well by imposing the burden on the favored class, rather than removing it from the disfavored class. Still, the cure employed by the Illinois Court appears to be virtually unique.

That the courts have consistently seen fit to avoid the remedy adopted here,—despite its obvious availability,—strongly suggests that the judiciary has been well aware of its inherent chilling effect.

There are literally hundreds of reported decisions in which the courts have been required to deal with a contention that a particular taxing statute was inconsistent with the equal protection mandate, and in a fair proportion of those cases the challenge has been sustained. Yet it is nearly impossible to locate a case in which the successful challenger has found himself in the untenable predicament which now confronts Lake Shore,—i.e., to have successfully asserted the infringement of its constitutional rights, but not to obtain the benefits of the victory.

III.

THE CLASS ACTION FINDING IN SHAPIRO v. BARRETT IS VOID FOR WANT OF DUE PROCESS OF LAW, AND THE ADVERSE JUDGMENT THEREIN HAS NO RES JUDICATA EFFECT WITH RESPECT TO LAKE SHORE AUTO PARTS CO. OR ANY OTHER ILLINOIS CORPORATION EXCEPT WEIL & SONS, INC.

The case of *Shapiro v. Barrett* (No. 71-691) was filed in the Circuit Court of Cook County while *Lake Shore Auto Parts Co. v. Korzen* (No. 71-685) was pending before the Illinois Supreme Court. The four plaintiffs in the *Shapiro* case each claimed to represent a separate class of personal property taxpayers,—corporations, partnerships, sole proprietorships, and natural persons not engaged in business. Lake Shore, of course, was not a party to that case.

Hardly any pretense was even made that *Shapiro v. Barrett* was an adversary proceeding. Its preordained nature is demonstrated by many things, both within and without the record. Not the least of these is the fact that the forms of relief nominally sought by the various plaintiffs were mutually antagonistic to one another (See the complaint, at Rec. 265, 273-5). Notwithstanding this incompatibility of interest, the four plaintiffs joined in the filing of a single complaint and filed a joint brief in the Illinois Supreme Court. (That complaint and brief are attached as exhibits to a document filed with this Court by Lake Shore on May 17, 1972, and designated "Reply of Lake Shore Auto Parts Co. to Response of M. Weil & Sons, Inc., to Motion of Maynard Respondents For an Order Recognizing Them as Parties to the Appeal.")

The nonadversary nature of *Shapiro v. Barrett* is further demonstrated by the lightening-like speed with which the case moved to final judgment in the circuit court. Only twenty days elapsed between the filing of the complaint and the entry of the final decree. The "hearings" in the case consisted of two sessions at which counsel for the various participants orated at length on wholly irrelevant matters. Shortly after the entry of the decree a notice of appeal was filed and a single justice of the Illinois Supreme Court, in vacation, entered an order consolidating the case for hearing with *Lake Shore Auto Parts Co. v. Korzen*.

The original purpose of *Shapiro v. Barrett*, apparently, was to obtain from a trial judge assigned to the tax division of the circuit court (not the chancery judge who had heard the *Lake Shore* case) a decree holding that

Article IX-A should be construed so as to exempt from ad valorem personal property taxation only the property of natural persons "used for the personal enjoyment of themselves and their families." Evidently the participants felt that a trial court ruling to that effect might persuade the state supreme court to adopt that interpretation,—thereby eliminating the equal protection problem and permitting the continued taxation of corporations.

The Illinois Supreme Court, of course, rejected this argument and directed dismissal of the complaint in *Shapiro v. Barrett*. That court, also, in its discussion of the *Shapiro* action, seems to have recognized the questionable nature of that case when it stated (49 Ill. 2d 137, at p. 145; App. 25):

"That it is not necessary that each person or group of persons favorably or unfavorably affected by a legislative classification be made parties to an action challenging the validity of that classification is apparent . . . Additional class actions were not necessary to place before the court all pertinent legal theories."

In view of the court's disposition of *Shapiro*, however, it presumably felt that any further action or comment on its part was unnecessary.

If this were all that were involved in *Shapiro v. Barrett*, Lake Shore would have no particular concern about that case. A problem is presented, however, by the trial court's finding in *Shapiro* (App. 16) that:

"2. Each of these plaintiffs has standing to bring this action in his or its own behalf and is a proper representative of his class.

"3. That this action is properly maintained as a class action, and the members of those classes are

adequately and competently represented by counsel herein."

Lake Shore, of course, is a member of the class of corporations claimed to be represented ("adequately and competently") by M. Weil & Sons, Inc., one of the plaintiffs in *Shapiro v. Barrett*. (*Lake Shore v. Korzen* was also brought as a class action, but the trial judge in that case deferred a ruling on the class action question. App. 6).

If the class action findings in *Shapiro v. Barrett* are valid, then the order of the trial court dismissing the complaint as to M. Weil & Sons, Inc. (which order was affirmed by the Illinois Supreme Court and further review not sought by any plaintiff) would necessarily have *res judicata* effect as to Lake Shore so as to bar Lake Shore from further arguing, in this Court or elsewhere, the merits of the basic constitutional issue discussed in Point I of this brief,—to say nothing of Lake Shore's right to assert its own claim to represent the class in any subsequent proceedings below.

This result would follow from the fact that the complaint in *Shapiro v. Barrett* (Rec. 265), while bordering on incoherency, may be construed to set forth a cause of action at least as broad as that set out in Lake Shore's complaint. The motion to dismiss the complaint in *Shapiro*, filed by the Cook County taxing officials (Rec. 291), contends that the complaint fails to state a cause of action. That motion was sustained by the trial court, and this ruling was affirmed on appeal.

Dismissal of a complaint for failure to state a cause of action constitutes a ruling on the merits, and is *res judi-*

cata as to all issues encompassed therein: *Elston-Damen Currency Exchange, Inc. v. Sheon*, 46 Ill. App. 2d 218, 223 (1964); *Vanlandingham v. Ryan*, 17 Ill. 25, 30 (1855).

By reason of the foregoing, it behooves Lake Shore to establish that the purported class action findings in *Shapiro v. Barrett* are void and of no effect whatsoever. This is particularly so inasmuch as M. Weil & Sons, Inc. has repeatedly asserted in this Court that it represents a class consisting of all Illinois corporations, and that it "has been declared by Illinois' courts properly to have maintained its action not only as an individual corporation, but as a representative of every corporation in the State of Illinois, and that each member of this class of corporate entities is adequately and competently represented herein."⁽²⁵⁾ This assertion is remarkable under the circumstances (i.e., the dismissal of Weil's complaint), and especially so in light of the Illinois Supreme Court's statement (App. 25) that "additional class actions were not necessary".

In other words, M. Weil & Sons, Inc. proclaims and insists that the entire class which it purports to represent ("adequately and competently") is bound by the adverse judgment rendered against Weil in the trial court, affirmed on appeal to the Illinois Supreme Court, and review of which was not sought in this Court by Weil.

This Court may be puzzled as to why a party purporting to adequately and competently represent a class of

⁽²⁵⁾ Brief of M. Weil & Sons, Inc., at p. 2. See also the Response of M. Weil & Sons, Inc. to Motion of *Maynard* Respondents for an Order Recognizing Them as Parties to the Appeal, at p. 1 (filed May 12, 1972).

plaintiffs would want to insist that this class should be bound by an adverse judgment. That question is no more puzzling, however, than the question of why M. Weil & Sons, Inc. should contend that Article IX-A is unconstitutional and void,—a result which yields no benefit to the class which Weil purports to represent. (Brief of M. Weil & Sons, Inc., at pp. 3 and 6-9).

The class action findings in *Shapiro v. Barrett* were unsupported by any evidence whatsoever, were made without any hearing or notice to any party, let alone to absent class members, and the transcript of the "argument" before the trial court reveals no mention at all of the class action issue. The findings were simply inserted in the proposed decree by the parties and presented to the judge for signature. Under these circumstances, the adverse judgment of the court clearly cannot, consistent with the requirements of due process of law, be binding in any way upon absent class members. *Hansberry v. Lee*, 311 U.S. 32 (1940); *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555, 564-5 (2d Cir., 1968). Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

CONCLUSION.

For the reasons set forth herein, Lake Shore Auto Parts Co., Respondent in No. 71-685, respectfully asks that this Court affirm the judgment of the Illinois Supreme Court insofar as that court held unconstitutional the discriminatory taxing pattern established in Illinois following the adoption of Article IX-A as an amend-

ment to the Illinois Constitution of 1870; that the judgment below be reversed insofar as it declared Article IX-A to be unconstitutional and void by reason of the equal protection clause of the fourteenth amendment; that this Court declare the Revenue Act of Illinois to be unconstitutional and void insofar and to the extent that it purports to impose ad valorem personal property taxes only upon the property of corporations and other non-individuals while at the same time exonerating from tax the property of individuals; and that this Court vacate and hold for naught the purported findings, in *Shapiro v. Barrett*, that the plaintiffs therein adequately and competently represent the classes of taxpayers which they claim to represent.

Respectfully submitted,

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APPENDIX A

Explanation of Amendment

The amendment would abolish the personal property tax by valuation levied against individuals. It would not effect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870. Article IX-A, thus setting aside existing provisions in Article IX, section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations.

Arguments in Favor of the Proposed Amendment

The purpose of the proposed addition of Article IX-A to the Constitution is to abolish the unfair and unworkable taxation of personal property of individuals throughout Illinois.

The present taxation of personal property of individuals is unfair because:

—It is not evenly administered, and cannot be. Variations in assessment practices from one assessing district to another are extreme, and result in unfair treatment of some taxpayers while others virtually escape any taxation of this kind. Individuals comprising about a third of the population of the State pay no personal property taxes whatever, while the rest pay taxes on their automobiles, on their household furniture, in some cases on their bank accounts and other financial resources, and, in

rural areas, on their livestock, grain, farm implements, etc.

—The taxation of personal property is a relic of the 19th century, when agriculture was the predominant occupation in the State, when a man's worth and ability to pay could be measured by his material possessions, when intangible assets were not at all common, and when personal property could not be easily hidden from assessors. Things are different today. Intangible assets are common, but not easily assessed and taxed. Thus, personal property taxation is now made, for the most part, of necessities of modern life such as family automobiles and a family's furniture.

—Personal property taxation encourages cheating and evasion. Virtually every property taxpayer in the State perjures himself every year because he does not report all of his personal property to the assessor. This built-in feature of personal property taxation cannot do otherwise than to aid and abet the disintegration of the moral values of our society which we have cherished for so long and which we see slipping away day by day.

If adopted by the People of Illinois, this amendment to our Constitution will:

—Remove the necessity of cheating on taxes, remove the impossible demands now placed on assessors to achieve fair taxation, and, above all, remove an onerous and universally despised tax program.

—Modernize the revenue provisions of our Constitution, an objective of which the People of Illinois have indicated they are heartily in favor.

The abolition of personal property taxation should be accomplished by constitutional reform. It should not be left to statutory action, which cannot be permanent in nature and which most certainly would lead to continuous court action and indecision as to exactly what was intended.

Even the placing of this question on the ballot for the People to consider has been a powerful indication to Illinois' constitutional convention delegates that the People prefer to end this unfair kind of taxation. At the time these arguments in favor of amending the Constitution were prepared, it could not be known what the constitutional convention's final decision on personal property taxation would be. But adoption of this amendment will indicate, once and for all time, that the People are fed up with unfair taxation.

The loss of revenue to local governments in Illinois if personal property taxation of individuals is abolished will be considerable, to be sure. But modernization of our entire tax system will make possible replacement of this needed revenue through other, fairer, sources.

In short, there is no compelling argument which can now be raised against adoption of this amendment. And there is every reason to support it.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-685

ROBERT J. LEHNHAUSEN,
Petitioner,
vs.

LAKE SHORE AUTO PARTS, et al.,
Respondents.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

As chief executive officer of the State, the Governor of Illinois not only has the responsibility faithfully to execute the laws but also to plan and implement a sound and fair taxation program that will ensure the financial integrity of the State. As a principal part of this program, the Governor advocated, and the people of the State of Illinois approved by constitutional referendum, the abolition of the personal property tax as it relates to individual persons.

The invalidation of the constitutional amendment by the Illinois Supreme Court, solely on Federal constitutional grounds, has undermined the Governor's taxation program and has perpetuated in Illinois a tax that is almost universally conceded to be inequitable and impossible to administer fairly. Unless the judgment of the Illinois Supreme Court is reversed, state governments will be placed in a Federal constitutional strait jacket, unable to develop

fair and effective taxation programs. Moreover, legislatures in other States may be seriously misguided in the development of their taxation programs if they proceed under the influence of the Illinois Court's erroneous view of Federal constitutional law.

The majority opinion of the Illinois Supreme Court, relying solely upon Federal constitutional grounds, placed substantial restrictions on the State's taxation powers which seriously impair the power of both the legislature and the people of the State by constitutional amendment to make rational classifications for taxation purposes. Only this Court can correct this erroneous interpretation of Federal constitutional law and remove the improper restrictions imposed by the Illinois Court, under color of Federal constitutional law, upon the State's taxation program.

QUESTION PRESENTED

Whether the Illinois Supreme Court Erred in Holding, Contrary to the Controlling Decisions of This Court, That Abolition of the Personal Property Tax Upon Individuals But Not Upon Corporations, by Means of a State Constitutional Amendment, Created an Unreasonable and Invidious Discrimination Between Individuals and Corporations in Violation of the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

On November 3, 1970, the people of the State of Illinois approved an amendment to the State's 1870 Constitution (Article IX-A) which stated in pertinent part that "[n]otwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*" (Emphasis in original.)

This suit was brought by a corporate taxpayer challenging the constitutionality of the constitutional amendment on the grounds, *inter alia*, that removing the personal property tax burden from individuals, but maintaining that burden upon corporate taxpayers,* constituted invidious discrimination against corporations in violation of the Equal Protection Clause of the Fourteenth Amendment. A majority of the Illinois Supreme Court sustained this contention, holding that, at least for the purpose of the imposition of an *ad valorem* personal property tax, no rational distinction could be drawn between individuals (i.e., natural persons,) and corporations; hence, to relieve one class alone of the tax burden constituted a violation of the Equal Protection Clause.

The effect of the Illinois Court's decision was to resuscitate the personal property tax as to individuals, notwithstanding the fact that the people of the State of Illinois had intended to abolish the tax on individuals when they overwhelmingly approved Article IX-A to the 1870 state constitution.

It is important also that this Court note what is *not* involved in this case in its posture before this Court. In the Illinois Supreme Court, there was a dispute among the parties as to the scope of the term "individuals" as used in Article IX-A. The question of the proper interpretation of this term was authoritatively decided by the Illinois Supreme Court as a matter of state law.

* Under the new 1970 Illinois Constitution, the legislature must abolish *all* personal property taxes on or before January 1, 1979. The new Constitution provides that any personal property tax abolished before the effective date of the Constitution (July 1, 1971) may not be reinstated. 1970 Ill. Const., art. IX, § 5(b). This provision was added in contemplation that personal property taxes on individuals would be effectively terminated by Article IX-A of the 1870 Constitution.

To the extent that argument by the parties here involves their view of the proper interpretation of "individuals," the parties raise issues, not for determination now by this Court, but for determination in subsequent proceedings (if any) in the state courts of Illinois. Therefore, the sole question before this Court is whether the distinction drawn in Article IX-A between individuals (i.e., natural persons) and corporations is permissible under the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

The Illinois Supreme Court Erred in Holding, Contrary to the Controlling Decisions of This Court, That Article IX-A of the 1870 Illinois Constitution, Which Abolished the Personal Property Tax as to Individuals But Not as to Corporations, Created an Unreasonable and Invidious Discrimination Between Individuals and Corporations in Violation of the Equal Protection Clause of the Fourteenth Amendment.

The general principles applicable to the instant case are clear, although their application in the present case produced a sharp division in the Illinois court. The prevailing judgment and decision, invalidating the state constitutional amendment, are not consistent with the often-expressed views of this Court.

The applicable principles regarding the validity of state taxation statutes under the Equal Protection Clause have been frequently reiterated by this Court. Thus, for example, in *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), this Court stated the following:

"...The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the

guaranties of the Federal Constitution, the States have the attribute of sovereign powers in divising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Citations omitted.] 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co. v. Conway*, [281 U.S. 146, 159]." 358 U.S. at 526-527.

More generally, this Court has frequently noted that a classification is not arbitrary or violative of the Equal Protection Clause if *any* state of facts reasonably can be conceived that would sustain the classification. E.g., *Jefferson v. Hackney*, 406 U.S. 535, 546-551 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). Thus, the question presented in the instant case is simply this—whether any rational distinction can be drawn between corporations and individuals so as to justify the imposition of a personal property tax (or, indeed, any other tax) upon the corporations but not upon the individuals.

This Court has long taken cognizance of the fact that the corporate structure yields advantages which justify the imposition of higher or different taxes upon corporations, as opposed to individuals. This Court has noted that

"[t]hese advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships." *Flint v. Stone Tracy Co.*, 220 U.S. 107, 162 (1911) (excise tax upon corporations measured by net income sustained).

Because of these advantages, this Court has therefore held, in numerous circumstances, that taxes may be imposed upon corporations, as opposed to individuals, or upon certain types of corporations, as opposed to other types of corporations and individuals. Thus, for example, in *White River Co. v. Arkansas*, 279 U.S. 692 (1929), this Court sustained a statute imposing back taxes upon corporations if their property had previously been undervalued over the constitutional objection that the reassessment provisions were not applicable to natural persons.

The *White River* case is the first of several cases* that undermined the authority of *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928) (Holmes, Brandeis, and Stone, JJ., dissenting), which struck down a state corporate gross receipts tax on equal protection grounds. *Quaker City*, therefore, stands as a relic from an earlier period in which this Court, with some frequency, struck down state regulatory and taxation statutes on Fourteenth Amendment

* E.g., *Lawrence v. Tax Comm'n*, 286 U.S. 276 (1932); *Bekins Van Lines v. Riley*, 280 U.S. 80 (1929); *Commonwealth v. Life Assurance Co.*, 419 Pa. 370, 214 A.2d 209 (1965), appeal dismissed, 384 U.S. 268 (1966).

grounds. The majority of the Illinois Court apparently recognized this fact by relying upon, although misapplying, the *dissenting* opinion of Mr. Justice Brandeis in *Quaker City*. The Illinois Court erred in failing to recognize that Mr. Justice Brandeis in fact took the position that a rational basis did exist for distinguishing between corporate and individual taxpayers, citing *Flint v. Stone Tracy Co.*, *supra*:

"There, as here, the tax was imposed merely because the owner of the business was a corporation, as distinguished from an individual or a partnership. There, as here, the character of the owner was the sole fact on which the distinction was made to depend. There, as here, the discrimination was not based on any other difference in the source of the income or in the character of the property employed." 277 U.S. at 411.

See, in addition, *Fort Smith Lumber Co. v. Arkansas*, 251 U.S. 532 (1920) (Holmes, J.) (State may discriminate between corporations and individuals by making former liable to be taxed on shares held in other corporations, themselves fully taxed, while leaving individuals free from such liabilities); cf. *Atlantic Coast Line v. Daughton*, 262 U.S. 413, 423-424 (1923). See also *Crescent Oil Co. v. Mississippi*, 257 U.S. 129, 137 (1921).

In *Nashville, Chattanooga & St. L. Ry. v. Browning*, 310 U.S. 362 (1940), this Court sustained the assessment of an *ad valorem* property tax upon both tangible and intangible property which was assessed differently with respect to (and with greater liability upon) public service corporations than upon all other taxpayers. In addition, see, e.g., *Rapid Transit Corp. v. New York*, 303 U.S. 573, 578-579 (1938). See also *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Charleston Ass'n v. Alderson*, 324 U.S. 182, 190-191 (1945).

Not only have the States, consistently with the Equal Protection Clause, been permitted to distinguish, for taxation purposes, between individuals and corporations and between corporations of various types, but the States have been permitted, if their policy so dictated, to exempt entirely from taxation (including *ad valorem* property taxation) particular property based upon the nature of the owner of the property. See, *e.g.*, *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 512 (1937); *Randolph v. Simpson*, 410 F.2d 1067, 1069 (5 Cir. 1969). The most recent case in this area is *Waltz v. Tax Comm'n*, 397 U.S. 664, 673 (1970), in which this Court sustained state property tax exemptions for institutions and facilities owned by religious and other charitable organizations.

As previously stated, there are substantial differences between corporations and individuals, and the "Constitution does not require things different in fact . . . to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). While all personal property taxes are to be eliminated in Illinois on or before the beginning of 1979, the people of Illinois, by constitutional amendment, chose to recognize "degrees of evil" (*Truax v. Raich*, 239 U.S. 33, 43 (1915)) and to eliminate the tax in the first instance upon individuals who do not enjoy the advantages which flow from ownership of property in a corporate form.

The majority of the Illinois Supreme Court were persuaded that, because the tax in question was a property tax, a valid classification under the Equal Protection Clause could not be based upon the character of the owner.* Not

* "The new article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely

only did the Illinois Court cite no authority for the talismanic quality which it ascribed to the property tax, but, as previously indicated (pp. 4-7, *supra*), its view is not consistent with that adopted by this Court.

Moreover, as this Court has indicated, the practical operation of a statute, rather than the form of words used therein, constitutes the critical factor in determining the constitutionality of such a statute. E.g., *Lawrence v. Tax Comm'n*, 286 U.S. 276, 280 (1932) (statute taxing individuals, but not domestic corporations, on income derived from activities outside state sustained). In substance, a property tax is not imposed upon inanimate property, but rather upon the persons who own that property, who exercise the right to hold and enjoy the fruits of that property. There is therefore no reason why, for the purposes of the Fourteenth Amendment, the type of ownership of property—be it corporate or individual—cannot provide a rational basis for classification. If corporations and individuals may be classified differently with respect to their right to receive or earn income,* for example, then there is no basis in reason why they cannot also be classified

upon the ownership of the property." 49 Ill.2d at 148, 273 N.E.2d at 598.

The Illinois Court further stated:

"When classifications are reasonable it is because of differences in the nature of the property or in the use to which it is put. The nature of the tax is important, too, for what may be a reasonable classification for a license, or for a privilege tax, is not necessarily a reasonable classification for a property tax." 49 Ill.2d at 149-150, 273 N.E.2d at 598.

* Both the Illinois Supreme Court and this Court have held that individuals and corporations may be distinguished in the burden of the income tax which each type of entity must bear. E.g., *Lawrence v. Tax Comm'n*, *supra*; *Thorpe v. Mahin*, 43 Ill.2d 36, 250 N.E.2d 633 (1969).

rationally with respect to the taxation of their right to own, control and enjoy the fruits of personal property.

In summary, therefore, the amicus contends (1) that there is a rational basis to distinguish between individuals and corporations in regard to the imposition of the personal property tax because of the basic differences between these two types of entities and the advantages which the corporate form of ownership affords; and (2) that there is no reasonable basis to distinguish between the property tax and other forms of taxation where distinctions between individuals and corporations have consistently been sustained by this Court over constitutional objections.

CONCLUSION

For all of the foregoing reasons, the amicus respectfully urges that the judgment of the Supreme Court of Illinois be reversed.

Respectfully submitted,

RICHARD B. OGILVIE
Governor of the State of Illinois
State Capitol
Springfield, Illinois

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IN THE

Supreme Court of the United States

NOVEMBER TERM, A.D. 1971

No. 71-691

EDWARD J. BARRETT, County Clerk of Cook County,
Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS**

BRIEF OF THE PETITIONER

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The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1900. The names are given in alphabetical order of their surnames. The names of the persons who have been elected to the office of Justice of the Peace for the year 1900 are: [illegible text]

[illegible text]

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**ON WRIT OF CERTIORARI TO THE
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BRIEF OF THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 49 Ill. 2d 137, 273 N.E. 2d 592 (1971).

JURISDICTION

The Judgment of the Illinois Supreme Court was entered on July 9, 1971. A timely Petition for Rehearing was denied by that court on August 24, 1971. That court's Order of Denial appears in the Appendix hereto. This Petition for Certiorari was filed within ninety (90) days of that date; and granted April 3, 1972.

QUESTIONS PRESENTED

1. Whether the highest court of a State can ignore the existence of a new (1970) Constitution of that State;—

Which Constitution had been adopted, and by its terms went into effect and became the Supreme Law of that State prior to, *and was in effect at the time* of that court's decision of a case directly challenging the Federal constitutionality of a recent Amendment to the prior (1870) Constitution of that State; and, — Which Amendment had previously been submitted to, and was overwhelmingly approved and adopted by the electorate of that State as the first step of a program for the gradual, but total abolishment of the personal property tax in that State; and—

Despite the fact that it was properly urged in both pleadings and oral argument in the State court that the integral significance of the new Constitution to the Amendment challenged, and of that Amendment to the new Con-

stitution; proved the immunity of the Amendment to the infirmity charged. And despite the fact that the highest court of that State, without significant exception, until the decision in that case had declared that the law of that State required that court to apply the law of the State as that law existed at the time that case was decided by it, and not as it was at the time that case might have arisen; and—

Whether, in a matter of such ultimate public consequence, and involving consideration of such exquisite juridical intimacy as that presented by the unique triumvirate of prior State Constitution, present State Constitution, and Federal Constitution; and where the importance of each to the other, and all of which, has been directed to the attention of that court. Under such circumstances, can that court ignore the existence of one member of that triumvirate (the new State Constitution) so totally, that the Opinion issued by that court is utterly devoid of any mention, or even the slightest intimation, that a new Constitution was in effect in that State at any time, before, or during the pendency of that case before that court; and—

Whether the highest court of a State can ignore the existence of a new State Constitution,—the presence of which has been properly directed to its attention, and the import of which on the issue before the court has properly been urged;—and limit its examination, in determining the public policy of that State, to inquiries exclusive of that new Constitution; and—

Whether, under such circumstances, the highest court of a State can avoid, by absence of any mention in the Opinion it issues, its obligation, and, duty,—in a case of profound importance and grave future consequence to the people of that State,—to address itself to substantial issues raised, consider vital facts urged, and refrain from

recognizing, publishing, confronting, and disposing of such matters.

Whether the Illinois Supreme Court committed grave error in refusing to comprehend the public policy of that State, by ignoring that public policy as declared by the electorate and embodied in both Article IX-A of the prior Constitution and the new (1970) Constitution.

2. Whether the highest court of the State of Illinois, although properly employing the basic criterion established by this Court to measure conformance to the equal protection clause of the Fourteenth Amendment of classifications, has improperly interpreted and applied the pronouncements of this Court, and reached a conclusion wholly beyond the protection which that clause of the Fourteenth Amendment was intended to assure.

3. Whether the highest court of the State of Illinois, by ignoring that State's new Constitution, the existence of which was properly directed to its attention, and the vital significance of which constitution was properly urged; and by refraining, in its Opinion, from any mention whatsoever of any of these matters, has, by such avoidance in its Opinion, denied to these petitioners of due process of law and the equal protection of the law, which entitlement and protection to all persons, including these petitioners, the Fourteenth Amendment was intended to assure.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

Fourteenth Amendment, Section 1.

(Equal protection and due process clauses)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTIONS OF THE STATE OF ILLINOIS:

1870 Constitution, Article IX.

" §1. Tax by valuation, how levied

The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that *every person and corporation shall pay a tax in proportion to the value of his, her or its property*—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates." (Emphasis added)

1870 Constitution, Amendatory Article IX-A, in effect January 1, 1971.

"Article IX-A

TAXATION OF PROPERTY

§ 1. Taxation of personal property prohibited.

Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*"

"SCHEDULE

"Paragraph 1. This amendment shall become effective January 1, 1971."

1970 CONSTITUTION: Article IX, Adopted in Convention at Springfield, September 3, 1970. In force July 1, 1971.

"SECTION 1. STATE REVENUE POWER

The General Assembly has the exclusive power to raise revenue by law except as limited or otherwise provided in this Constitution. The power of taxation shall not be surrendered, suspended, or contracted away.

**SECTION 2. NON-PROPERTY TAXES—
CLASSIFICATIONS, EXEMPTIONS,
DEDUCTIONS, ALLOWANCES
AND CREDITS**

In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

SECTION 3. LIMITATIONS OF INCOME TAXATION

(a) A tax on or measured by income shall be at a non-graduated rate. At any one time there may be no more than one such tax imposed by the State for State purposes on individuals and one such tax so imposed on corporations. In any such tax imposed upon corporations the rate shall not exceed the rate imposed on individuals by more than a ratio of 8 to 5.

(b) Laws imposing taxes on or measured by income may adopt by reference provisions of the laws and regulations of the United States as they then exist or thereafter may be changed, for the purpose of arriving at the amount of income upon which the tax is imposed.

SECTION 4. REAL PROPERTY TAXATION (Has no bearing)

SECTION 5. PERSONAL PROPERTY TAXATION

(a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.

(b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.

(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes *subsequent to January 2, 1971*. Such revenue shall be replaced by imposing state-wide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes *because*

of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes shall not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3 (a) of this Article.
(Emphasis added.)

SECTION. 6. EXEMPTIONS FROM PROPERTY TAXATION

The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes. The General Assembly by law may grant homestead exemptions or rent credits.

SECTION. 7. OVERLAPPING TAXING DISTRICTS (Has no bearing)

SECTION. 8. TAX SALES (Has no bearing)

SECTION. 9. STATE DEBT (Has no bearing)

SECTION. 10. REVENUE ARTICLE NOT LIMITED (Has no bearing)"

STATEMENT OF THE CASE

Illinois Constitution of 1870 was in effect at all times prior to January 1, 1971. Section 1 of Article IX, the Revenue Article, of that 1870 Constitution directed as follows:

Taxation of Property—Occupations—Privileges.

§ 1. The General Assembly shall provide such revenue as may be needful, by levying a tax, by valuation, so that every *person* and *corporation* shall pay a tax in proportion to the value of his, her, or its property—

such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor-dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates." (Emphasis added)

In accordance with that mandate, the General Assembly of the State of Illinois did enact such legislation, which appears in Illinois' statutes as the Revenue Act of 1939, Chapter 120, sections 482 *et seq.*, Ill. Rev. Stats., 1969. Sections 528-560 provide for the taxation of personal property by valuation as to all persons (with the exception of certain usual and recognized exemptions not relevant) without regard to the nature, character, ownership, or the use of that personal property either to produce income or its use for non-income productive purposes.

On February 27, 1970, the Secretary of State, pursuant to law, did cause to be printed, did certify and did publish a document setting forth a proposed amendment (Article IX-A) to be added to Illinois' Constitution of 1870, an explanation of the proposed amendment, the arguments for and against that amendment, and the form in which that amendment would appear upon a separate blue ballot to be submitted to the electorate of the State of Illinois. That document, absent the arguments for and against the proposed amendment, is as follows:

**"AMENDMENT
to the
CONSTITUTION OF ILLINOIS
THAT WILL BE SUBMITTED TO THE VOTERS
NOVEMBER 3, 1970**

This folder includes
**PROPOSED AMENDMENT TO CONSTITUTION,
EXPLANATION OF PROPOSED AMENDMENT
ARGUMENTS IN FAVOR OF PROPOSED
AMENDMENT**

**ARGUMENTS AGAINST PROPOSED
AMENDMENT**

FORM OF BALLOT

**(Seal of the State of Illinois)
Published in compliance with Statute
by**

**PAUL POWELL
Secretary of State**

To the Electors of the State of Illinois:

At the general election to be held on the 3rd day of November, 1970 a blue ballot will be given to you and you will be called upon in your sovereign capacity as citizens to adopt or reject the following proposed amendment to the Constitution of Illinois.

**PROPOSED AMENDMENT TO ADD
ARTICLE IX-A**

**(Prohibition of taxation of personal
property by valuation as to individuals.)**

ARTICLE IX-A

**Section 1. Notwithstanding any other provision of
this Constitution, the taxation of personal property
by valuation is prohibited as to individuals.**

SCHEDULE

Paragraph 1. This amendment shall become effective January 1, 1971.

EXPLANATION OF AMENDMENT

(See Form of Ballot)"

The form of that ballot and the ballot submitted to the electorate at the state-wide general election held on November 3, 1970, identically contain the explanation of that amendment (Article IX-A), as follows:

**"FORM OF BALLOT
PROPOSED AMENDMENT TO ADD****ARTICLE IX-A**

(Prohibition of taxation of personal property by valuation as to individuals.)

EXPLANATION OF AMENDMENT

The amendment would abolish the personal property tax by valuation levied against individuals. It would not affect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing provisions in Article IX, section 1, that require the taxation by valuation of all forms of property, real and personal or other, owned by individuals and corporations.
(Emphasis supplied.)

Place an X in blank opposite "Yes" or "No" to indicate your choice.

- ☐ YES For the proposed amendment to add Article IX-A to the Constitution. (Pro-
- ☐ NO hibition of taxation of personal property by valuation as to individuals.)"

Illinois' Constitution of 1870 was amended by the submission to, and overwhelming approval of Article IX-A by the electorate of the State of Illinois on November 3, 1970, which amendment was declared adopted and became part of that Constitution on November 25, 1970, to be effective January 1, 1971.

These petitioners are the officers of the County of Cook, Illinois, each of whom is charged with responsibilities under, and upon whom the Illinois Revenue Act of 1939 (Ch. 120 S 482 *et seq.*, Ill. Rev. Stat. 1969) imposes and compels the performance by each of them of specific duties relating to the assessment of locally assessed personal property taxes.

These petitioners, upon the adoption of Article IX-A to Illinois' Constitution of 1870, proceeded with their respective duties by the assessment of personal property tax against all property *other than* the personal property "owned by individuals and used for their personal enjoyment and that of their families."

These petitioners construed Article IX-A, which prohibited a tax on "Individuals," to intend only the exclusion from taxation of the personal property owned by private persons and used by them for non-revenue producing purposes, which construction recognized that assessors throughout the State of Illinois had established, through long-standing custom and usage, three (3) classes of Personal Property, i.e., that used (1) by corporations, (2) by unincorporated businesses and (3) by Individuals.

These petitioners have always contended, and urge to the Court that their construction is correct, because, exclusive of any other reasons, no other intention is plausibly inferable from the face of that Amendment and the specific declaration and express assurance submitted to the electorate of that State in the "Explanation of Amendment" that:

"It [Article IX-A] would not affect the same tax levied against corporations and other entities not considered in law to be individuals."

The three cases, consolidated by the Illinois Supreme Court, and in which the judgment to be reviewed here was entered, arose from the adoption of Article IX-A and the intention ascribed to that Article by these petitioners.

The Posture Below Of The Three Cases Consolidated

Lake Shore, No. 44199, in which these petitioners were defendants, appeared before the Illinois Supreme Court on appeal by these petitioners-defendants from a judgment of the circuit court (the trial court in Illinois) of Cook County, Judge Walter Dahl, presiding. That judgment, conforming with, and adopting the premise urged by plaintiff-corporation there, held that the effect of Article IX-A was to amend Illinois' Revenue Act of 1939, whereby that Act discriminated against corporations and in favor of non-corporate entities, thus rendering *that Act as so amended*, offensive to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; the consequence of which, that court held, was to render invalid and void, in its entirety, the personal property tax in Illinois.

These petitioners urged the trial court, and, as appellants, urged the Supreme Court to dismiss that complaint for failure to state a cause of action.

The Illinois Supreme Court reversed and remanded *Lake Shore*, directing the trial court to dismiss that complaint.

Maynard, No. 44308, appeared before the Illinois Supreme Court upon leave granted by that court to file that suit in that court as an original action for declaratory

judgment. These Petitioners were respondents-defendants there. The petitioners-plaintiffs in that case urged that Article IX-A discriminated unconstitutionally against corporations and prayed for the reimposition of the personal property tax on individuals as that tax was so imposed prior to its removal by the People of the State of Illinois in the Referendum held November 3, 1970, in which referendum the overwhelming majority of the voters of that State declared its prohibition.

These petitioners urged the Illinois Supreme Court to dismiss that complaint for want of capacity of those particular plaintiffs to maintain that action.

The Illinois Supreme Court dismissed the *Maynard* complaint. The order of that court, in full, is as follows:

"And now, on this day, the Court having diligently examined and inspected as well the complaint for declaratory judgment filed by petitioners and the pleas and the Motion by respondents to dismiss the complaint, and being fully advised of and concerning the premises, are of the opinion that the said complaint is not well taken.

THEREFORE, it is considered and ordered by the Court that the said complaint be and the same is hence dismissed."

Shapiro, No. 4432, appeared before the Illinois Supreme Court on appeal by the plaintiffs from the judgment of the circuit court of Cook County, Judge Thomas C. Donovan presiding. Both these petitioners who were defendants there, and the state defendant, filed motions in the circuit court to strike that complaint and dismiss that cause of action. Those motions were addressed exclusively to the merits of the issues raised in the *Shapiro* complaint.

That trial court sustained the intendment of Article IX-A as urged by these petitioners, and held that the prohibi-

tion against taxation declared there applied only to personal property, owned by individuals (natural persons) and used by them for their personal enjoyment and that of their families. Such tax exclusion, that court held, was immune to charges that the retention of that tax in all other regards imposed, resulted in a classification offensive to the equal protection clause of the Fourteenth Amendment.

The *Shapiro* case was the only one of the three consolidated cases that the Illinois Supreme Court considered on the merits and in which it decided the merits. In the *Shapiro* case, that court held, contrary to the position of these petitioners and the judgment of the trial court, that Article IX-A created an unreasonable classification offensive to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Grounds Upon Which The Judgment Of The Illinois Supreme Court Lies.

The sole ground upon which the conclusion reached by the Illinois Supreme Court is predicated appears to be the following:

"The new Article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but *solely upon the ownership* of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed." (App. page 13).

Applying the criterion to determine whether classification is reasonable, and which criterion was defined by this Court in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406, to include among its measurements:

"... that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State", (App. page 15),

the Illinois Supreme Court then conceived that:

"Article IX-A must be read against the scheme of property taxation established pursuant to Article IX of the Constitution of 1870. ..."(Emphasis added.)

Upon the above observations, the Illinois Supreme Court then concluded:

"Against this background the incongruity of the prohibition contained in Article IX-A is apparent. It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set." (App. page 16).

The Illinois Supreme Court thereupon concluded with the following judgment:

"We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the Fourteenth Amendment. Apart from that discrimination, the validity of the Revenue Act is not challenged, and we hold that it is Article IX-A which must fall. The validity of Article IX of the Constitution and of the Revenue Act are therefore not affected." (App. page 17).

On November 22, 1971, the petitioners herein filed with Court a petition for Writ of Certiorari to the Supreme Court of Illinois to review their decision in Consolidated Cases Nos. 44199, 44308, 44432 entered on July 9, 1971.

ARGUMENT**I.**

THE STATE COURT SINGULARLY IGNORED, AND FAILED TO FOLLOW AND APPLY THE SUBSTANTIVE RULE OF LAW ESTABLISHED BY THAT COURT, IMPOSED UNVARYINGLY, AND INDEED, INVOKED SUA SPONTE BY THAT COURT PRIOR TO THIS CASE. PROPER SUPERVISION BY THIS COURT OF THE STATE JUDICIARY DEMANDS THAT THE STATE COURT BE SET ARIGHT.

The issues before the state court had been joined, and oral argument was submitted and concluded on June 21, 1971, whereafter that case was before that court under its advisement.

On July 1, 1971, the new (1970) Constitution of the State of Illinois went into effect as the Supreme Law of that state.*

* Constitution of 1970: Due to the successful efforts of three legislative study commissions, influential public figures interested in reform, and an overwhelming mandate by the voters, Illinois' Sixth Constitutional Convention convened in Springfield on December 8, 1969. One hundred and sixteen members — two elected from each senatorial district — met at a nonpartisan Convention to revise, alter, or amend the 1870 Constitution.

After 9 months of in-depth study and debate, the members presented their work-product to the People — one they considered to be workable for 25, 50, or as in the case of the 1870 Constitution, 100 years.

The 1970 Constitution was approved by the electorate in a special election held for that purpose on December 15, 1970, two and one-half months after the Convention adjourned sine die. That Constitution provides it is in force, in that state, July 1, 1971.

On July 9, 1971, — eight days after the new (1970) Constitution went into effect, and while that Constitution was the "Supreme Law" in the State of Illinois, the state court rendered its judgment and opinion to be reviewed here.

Bearing in mind the above chronology, the significance of the failure of the state court to apply the rule of law demonstrated below, becomes most apparent, and discloses such gross oversight or error that correction of the judgment below is compelled.

Prior to that present decision of the Illinois Court in the instant case, it had been a long-established principle of Illinois law that courts of review must decide cases before it *in accordance with the law as it exists at the time of such decision* and not as it was at some prior time.

That rule of law is succinctly declared in *Illinois Chiropractic Society v. Giello*, (1960) 18 Ill. 2d at page 310:

"The rule is well established, however, that where the legislature has changed the law pending an appeal *the case must be disposed of by the reviewing court under the law as it then exists*, and not as it was when the decision was made by the trial court. (*Fallon v. Illinois Commerce Com.*, 402 Ill. 516; *People ex rel. Hanks v. Benton*, 301 Ill. 32; *People v. Askew v. Ryan*, 281 Ill. 231. *People ex rel. Law v. Dix*, 280 Ill. 158. We are bound, accordingly, to review the present decrees in the light of the 1959 amendment, to determine whether defendants may be entitled to the benefits thereof and to determine its applicability to the present proceeding." (Emphasis supplied.)

It suffices to observe that appropriate substitution of the facts here, in place of the facts there, discloses the appropriateness of that rule to this case and its necessary application by the state court.

The new Illinois Constitution was in effect. The state court was "bound accordingly, to review" the public policy of that State in the light of the relevance of that Constitution to that public policy.

The application of that rule of law, these petitioners respectfully submit, compels affirmance of the position asserted by them, and the relief sought by them. The state court should have applied that rule of law. Its application would have resulted in that court's judgment upholding the constitutionality of amending Article IX-A of the Illinois Constitution of 1870.

That this rule of law is of such decisive significance, and that its unvarying imposition is demanded, again, most recently, found confirmation by the state court in *Hamer v. Mahin*, 47 Ill. 2d 252, (1971).

In that case, in a brief two-page opinion, the state court responded *sua sponte*, and invoked that principle of law to dispose of that case.

That case arose in the September, 1970 term of the state court. That court's judgment and opinion was entered on December 4, 1970.

Article IX-A, the very Article which the state court has now held offensive to the Constitution of the United States, had been declared adopted only ten (10) days prior to that court's judgment, to wit, November 25, 1970 to be in force January 1, 1971.

That court's judgment was rendered there subsequent to the adoption of — but prior to the effective date of Article IX-A.

Indeed, in the instant case, the state court's judgment was not only rendered subsequent to the adoption of, but after the effective date of, and while the new Constitution was in force.

The appositeness between *Hamer* and the instant case is extremely apparent.

These petitioners deem the *Hamer* case to be of such extreme incisiveness and the language and reasoning of the state court to be so vital to this Court's complete understanding of the presentation here, that these petitioners beg this Court's indulgence and set out the entire context of the state court Opinion below, and submit that court's Opinion as their demonstration to this Court of the extreme importance of that rule of law, and the vital significance of the failure by that court to apply that rule in this case.

The *Hamer* opinion, in full, is as follows:

"MR. JUSTICE SCHAEFER delivered the opinion of the court:

This case is a sequel to *People ex rel. Hamer v. Jones*, 39 Ill. 2d 360, decided in March of 1968. In the present case, as in that one, the taxpayers, Paul E. Hamer and June T. Hamer, his wife, sought declaratory relief, an injunction and relief by way of *mandamus*, with respect to the asserted failure of the defendant, the Director of Revenue of the State of Illinois, to perform his statutory duty to equalize and assess all taxable property at its full, fair cash value.

Like the complaint in the earlier case, the present complaint alleges that the various types of real property in Lake County, "i.e., residential, unsold lots in subdivisions, improved farm lands, commercial and industrial property, have since 1961 and each year thereafter been assessed and equalized at different per centums [sic] less than the full, fair cash value, varying from twenty percent (20%) to fifty-five percent (55%) of full, fair cash value and said property will, in the future, continue to be assessed and equalized at less than full, fair cash value in contravention of the law." The complaint also contains allegations concerning the

practices followed in Lake County with respect to the assessment of personal property.

In the earlier case this court affirmed the judgment of the circuit court of Lake County which dismissed the complaint on the grounds that to grant the relief sought would create extreme expense, disastrous disorder, and confusion and hardship for taxpayers. In addition, the court held that the taxpayer plaintiffs had failed to allege sufficient facts to show how they were damaged by the conditions they allege. In the case now before us the order appealed from found that the present complaint had remedied those defects referred to in the earlier case 'and complies in all respects with the opinion in the earlier cause.' The order further quoted from this court's opinion in that case and continued with the following finding and order:

'4. That it is clear from the court's opinion that the Supreme Court has retained in itself alone the right to determine that point in time when the court will no longer defer to legislative action in a matter as important to the state as the raising of its revenue.

It is hereby ordered that the above-entitled cause of action be and it is hereby dismissed without prejudice and without costs being taxed.'

In his brief the Attorney General thus describes the problem in this case: 'For 43 years the legislative mandate has been that all property in the State of Illinois should, for tax purposes, be assessed at its full fair cash value. For many years the administrative branch of the State of Illinois and, more particularly, the Department of Revenue, has not followed and carried out that legislative directive, unquestionably a violation of the legislative directive. For some 11 years plaintiffs-appellants have complained about this violation of the law, and have been engaged in a marathon of litigation seeking to force the Director of Revenue to follow the letter of the law.'

Everyone acknowledges that the problem is a difficult one. This court has not, however, intended to retain to itself alone the power to determine when, and to what extent, compliance with the constitutional command of uniformity is to be required.

Since the judgment of the trial court was entered, article IX-A was added to the constitution of the State of Illinois. That article, which becomes effective January 1, 1971, provides: 'Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals*.' Ill. Const., art. IX-A.

The judgment of the circuit court of Lake County is reversed and the cause is remanded for further proceedings in accordance with law. (emphasis supplied.)

Reversed and remanded."

In *Hamer*, the state court *sua sponte* observed and invoked the existence of Article IX-A, which, although adopted, was not yet in effect at that time, as authority for that court's declaration there, that:

"This court has not, however, intended to retain to itself alone the power to determine when, and to what extent, compliance with the Constitutional command of uniformity is to be required."

Yet, that same court, in the instant case, having before it the question of the uniformity of classification in Article IX-A, completely ignored and did not even mention the existence of Illinois' new (1970) Constitution, declared by the people to be the Supreme Law in that State, and which which was in effect at that time, as any authority, whatsoever, worthy of consideration in determining the public policy of that State, relevant to the existence and purpose of Article IX-A.

Such discrimination is offensive to the law, resists rationalization, and, indeed, in itself, denies to these petition-

ers due process of law and the equal protection of the law under the Fourteenth Amendment.

Puzzling, additionally, is the fact that unlike in *Hamer*, these petitioners did direct the attention of the state court to the existence of the new (1970) Illinois Constitution in their (appellants') Brief (pages 7 and 8) and, again, directed that court's attention in petition for rehearing filed by these petitioners subsequent to that court's entry of its judgment. (Petition for Rehearing, pp. 17, 18).

That court denied the petition for rehearing filed by these petitioners without comment or opinion.

That rule was confirmed and extended in a subsequent decision of the Illinois Court, *People ex rel. Ogilvie v. John W. Lewis, Secretary of State*, 49 Ill. 2d 464 (1971), which held that legislation may be tested by "an already ratified but not yet effective constitution even though the legislation possibly may not have been valid if tested by the Constitution in effect at the time of its passage." (p. 482).

Saying, "We read the cases * * * as standing for the general proposition that the enactment of legislation in anticipation of an adopted but not yet effective constitutional provision is within the plenary lawmaking power of the legislature * * *" (p. 483) [emphasis added]

II.

THE CONSEQUENCE OF THE STATE COURT'S FAILURE TO APPLY THE ESTABLISHED LAW IN THAT STATE IS THE DENIAL BY THAT COURT OF CONSIDERATION OF THE NEW (1970) ILLINOIS CONSTITUTION WHICH RESULTS IN A CONCLUSION REACHED BY THAT COURT THAT THE PUBLIC POLICY OF THE STATE OF ILLINOIS FAILED TO SUSTAIN ARTICLE IX-A, WHOSE CONSTITUTIONALITY UNDER THE FOURTEENTH AMENDMENT WAS ASSAILED. SUCH FAILURE CONSTITUTES ERROR, OF SUCH GROSS MAGNITUDE, AS TO COMPEL REVERSAL.

As these petitioners inform above, the existence of Illinois' new (1970) Constitution was directed to the attention of all of the courts of that State, both trial courts and the attention of the highest court of that State, and no rules or law of that State, governing the propriety of the timeliness and manner of presentation of this fact have been ignored or violated.

With all due deference to this Court, these petitioners deem their presentation to the state court of these matters to meet the dignity of presentation of those matters to this Court. Those presentations are re-presented to this Court as petitioner's reasons assigned here for the issuance by this Court of its writ of certiorari.

In the Brief filed by these petitioners in the *Maynard* case, these petitioners urged to the Illinois Supreme Court as follows:

"II.

"HOLDING ARTICLE IX-A UNCONSTITUTIONAL, AS PLAINTIFFS PRAY, WOULD FRUSTRATE THE INTENT OF THE ELECTORATE WHO ADOPTED THIS AMENDMENT TO THE ILLINOIS CONSTITUTION OF 1870.

"In addition, we submit that when Article IX-A was adopted by the taxpayers of this State, it was adopted with the expectation that non-revenue producing personalty would be exempt from taxation effective January 1, 1971. And that the tax would continue to be applied to revenue producing property until January, 1979, when the personal property tax was to be totally abolished and replaced by another tax, to be determined by the general assembly. The burden of the replacement tax was to fall on revenue producing property alone. This is provided for in Article IX, Section 5 (b) and (c) of the Illinois Constitution of 1970.

In addition, this section provides that the replacement tax, if it is to be measured by income, be an exception to the 8 to 5 ratio established in Article IX, § 3(a) of the Illinois Constitution of 1970.

If plaintiff's argument that Article IX-A is unconstitutional prevails, the exclusion from taxation of individuals will be void. 'Individuals' will therefore remain within the class of persons who are subject to the personal property tax after January 1, 1971. Therefore, when the personal property tax is abolished on or before January 1, 1979, and the replacement tax levied, 'individuals' will be subject to that replacement tax. Since the replacement tax, if measured by income, is not subject to the ratio-limitation of 8 to 5, such a tax could well be applied uniformly. That result, we submit, not only frustrates and subverts the intent of the drafters of Article IX-A of the Illinois Constitution of 1870, and the Illinois Constitution of

1970, but the understanding and expectation of the electorate who adopted these measures as well."

Again, in the petition for rehearing filed by these petitioners in the state court, they urged the following:

"POINT II"

"This Court Has Overlooked The Intimate Relationship, Interdependence, And Integral Consanguinity Between Article IX-A Of Illinois' Constitution Of 1870, And Revenue Article IX, Sections 5 (b) (c) And Section 3 (a) Of Illinois' New Constitution Of 1970, In Effect In This State Since July 1, 1971. It Is Both Of These Articles, Together, As One Entirety, (Not, As Misapprehended By This Court, Article IX-A, Alone) Which Impart The Purpose Sought To Be Accomplished And The Policy Of This State Declared By Its People To Be The Abolishment Of ALL Personal Property Tax In The State Of Illinois; And, As Well, The Policy Of This State As To The Removal Of That Tax From The Classes Bearing Its Imposition; And, As Well The Consequences Ensuring To Those Classes Of Taxpayers From Whom The Imposition Of That Tax Is Removed: All In Accordance With The Program Established By The People Of This State To Accomplish This Objective.

Recognition Of This Policy, Declared By The People Of This State To Be The Policy Established In This State, Comes Well Within The Criterion Held To Be Determinative Of The Validity Of Article IX-A, And Compels This Court's Observance Thereto, And The Reversal Of Its Present Judgment In Compliance Therewith.

"This Court's presently standing judgment declares Article IX-A violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. That conclusion emerges, the opinion of this Court informs, because the reasoning em-

ployed by the Court compels it to find that the classification established in Article IX-A fails to meet the tests invoked by the Court when passing upon the validity of legislation assailed under the equality clause of the Fourteenth Amendment. This Court's reasoning appears as follows:

First, this Court on Page 17 of its presently standing opinion, declares that,

'The new Article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed.'

After that observation, this Court next considers those criteria which are determinative of 'reasonableness of classification,' and adopts the criterion established on Page 21 of its opinion as the measure appropriate to that determination.

'Mr. Justice Brandeis stated the criterion this way in his dissenting opinion in *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406, 48 S. Ct. 553, 72 L. Ed. 927, 932: "In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the clarification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and that the difference must bear a relation

to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible'." (emphasis supplied.)

Immediately following this exposition this Court then proceeds to apply that criterion to measure the reasonableness of the classification in Article IX-A to ascertain its conformance with the requisite of that criterion 'that the object of the classification (intended by Article IX-A) must be the accomplishment of a purpose or the promotion of a policy which is within the permissible functions of the state. . . .'

That answer, this Court conceives, however must appear from and this Court deems its search for this answer to be confined solely to the area of inquiry circumscribed on page 21, as follows:

'Article IX-A must be read against the scheme of property taxation established pursuant to Article IX of the Constitution of 1870, . . .'

Whereupon, this Court then says on page 22, that its search, conducted within the confines of this limited area of inquiry, reveals that:

'Against *this background* the incongruity of the prohibition contained in Article IX-A is apparent. It *cannot rationally* be said that the prohibition *promotes any policy* other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others.' (emphasis supplied.)

This Court then concludes:

'We hold, therefore, that the discrimination produced by Article IX-A violates the equal protection clause of the fourteenth amendment.'

The syllogism employed by this Court from which the conclusion announced by this Court emerges, is

predicated upon the major premise found on Page 17 of this Court's opinion and quoted in full above.

This Court has misapprehended the purpose of Article IX-A. Contrary to this court's conclusion, that Article states that notwithstanding any other provisions in any of the laws of this State which impose that tax, the declared purpose of Article IX-A is to remove that tax, setting aside and holding for naught all provisions of the law which impose that tax. It is Article IX-A which removes the tax imposed. Article IX-A imposes no such tax. That this is so, clearly emerges from the observation that: if the purpose of Article IX-A was to impose such tax it would not have been necessary to submit the question of such tax imposition to the people of this State. That tax was already imposed on them. In addition, if that were the purpose of Article IX-A, these petitioners respectfully submit that Article IX-A, when submitted to the people of this State on November 3, 1970, would have suffered the most ignominious defeat at the polls ever recorded in the history of this State.

This Court's premise is that Article IX-A imposes a property tax. Of course, then, when Article IX-A is viewed in the light of Revenue Article IX of Illinois' new Constitution of 1970 which declares the abolishment and removal of that tax, the only conclusion emergent is that these two Articles are in direct conflict, the purpose of each separate and unrelated to each other, and on their face reject identity of objective — to effectuate one policy. Of course, in this context the comparison of these two conflicting purposes affords no indication of the policy of this State or the purpose for prohibiting prior to July 1, 1971 — the effective date of the new Constitution — the imposition of personal property tax on the class intended by Article IX-A; but invites the conclusion reached by this Court on Page 22 of its present opinion that, solely against the background of Article IX of Illinois' Constitution of 1870, no State policy is disclosed nor is the accomplish-

ment of any State purpose revealed, other than the removal of that tax from one class of taxpayers, while denying the enjoyment of such removal by other classes.

However, once the correct premise is discerned, to wit: that Article IX-A declares its prohibition exclusively as to that tax on the personal property owned by individuals and used for their personal enjoyment and that of their families; the criterion employed by this Court to determine the reasonableness of that classification invokes approval of that sole application of that prohibition to that class alone. The object of that classification then is discerned to be the initial and necessary step in the accomplishment of a purpose and the promotion of a policy which is within the permissible functions of this State.

This conclusion necessarily follows because, then, when Article IX-A of the 1870 Constitution is viewed in the light of Revenue Article IX of the new 1970 Constitution, it appears that both Articles deal with the removal of that tax and are integrally essential to the accomplishment of, and dedicated to the effectuation of the policy declared by the people of this State. A policy selected and approved by them: the abolishment, elimination and removal of that tax.

For this Court's convenience of comparison, Section 5 of Article IX of Illinois' new Constitution of 1970, as well as Section 3 (a), is set out in full as follows:

**'Section 5. PERSONAL PROPERTY
TAXATION**

(a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any of all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.

(b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.

(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes shall not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3(a) of this Article.'

**'Section 3. LIMITATIONS ON INCOME
TAXATION**

(a) A tax on or measured by income shall be at a non-graduated rate. At any one time there may be no more than one such tax imposed by the State for State purposes on individuals and one such tax so imposed on corporations. In any such tax imposed upon corporations the rate shall not exceed the rate imposed on individuals by more than a ratio of 8 to 5.'

These petitioners respectfully submit that once the misapprehension resulting in the present judgment is discerned, the import of the relationship between Article IX-A of the 1870 Constitution and Article IX of the new 1970 Constitution readily emerges. Likewise, readily emergent, is the significance of the synthesis and entire reliance of the new Article IX upon the established existence, the validity of the existence and the continued existence of Article IX-A, and the importance of the consideration of both old and new Articles in the determination of the declared policy of

the State of Illinois; of which, it is apparent, Article IX-A is but the initial step in the accomplishment of the policy declared by the people of this State to be the abolishment of that tax. (See also Brief of County Defendants Edward J. Barrett, et al., Point II, P. 7.)

The policy of this State thus overwhelmingly appears and resoundingly declares the abolishment of that tax on *ALL* personal property in the State of Illinois wherever situated; whatever its ownership; and howsoever used. That policy declares as well the removal of that tax from the classes bearing its imposition and declares as well the consequences enuring to classes of taxpayers from whom the imposition of that tax is removed; and, as well, that the removal of that tax be accomplished in accordance with, and in the manner prescribed in the program established by the people of this State to accomplish the eventual removal of the imposition of that tax from all classes of taxpayers by January 1, 1979.

These petitioners respectfully submit that the foregoing observations should compel this court's reconsideration and this court's agreement with the position of these County officer defendants-petitioners and the granting of the relief for which they have prayed.

This Court will recall that, on oral presentation, the State's Attorney of Cook County directed the Court's attention to personal property tax collection reports which were provided by the Cook County Defendants. These reports reflect the collection of \$149,657,296.21 in Cook County for the year 1969. Of this sum only \$1,975,983.46 was collected from 318,881 'Individuals' (the term 'Individual' does have a technical meaning in Personal Property Tax administration and practice if not in law), while \$147,771,312.85 was collected from 170,129 'non-individual' taxpayers.

This comparison is resubmitted for this Court's reconsideration, to demonstrate the insignificance of the economic consequences to tax supported bodies result-

ing from the removal of that tax from the class intended by Article IX-A, contrasted with the social and administrative advantage of reducing the number of taxpayers on the rolls by nearly two-thirds. We submit that these consequences are the essence of reasonableness; and that they reinforce these defendants' thesis that Article IX-A does not stand alone as an isolated instance of the removal, or imposition, of a tax, *BUT*, to the contrary it is the initial, integral step in a single unified program which, when completed, will eliminate the personal property tax in its entirety and remove its burden from each and every class of taxpayer. *AND*, that Article IX-A of the 1870 Constitution and Article IX of the 1970 Constitution bear a symbiotic relationship each to the other; so that violence done to one is violence done to its companion.

Indeed, this Court's presently standing opinion and judgment seriously impugns the constitutional integrity of Article IX of the Illinois Constitution of 1970."

The public policy of the State of Illinois, as that policy appears from Article IX-A and the new (1970) Constitution patently declares the abolishment of the personal property tax in Illinois. That public policy, just as patently, declares that such abolishment shall not be done in one sweeping blow because of the disruptive consequences to revenue, which is applied principally to maintenance and operation of public schools, by instant and total abandonment. To the contrary, Article IX-A and the new (1970) Constitution provides for the attainment of that goal over a period of time, and in several stages, whereby the economy and replacement revenue of the State can be appropriately adjusted and attuned to the eventual removal of that tax.

Indeed, the public policy of that State, in the recognition of the problems with which that State would be confronted, establishes a program and provides for a proce-

sure no different than that declared by this Court to be most appropriate to similar circumstances and concerns in the School Desegregation Cases. There, this Court refused to find offensive, but, to the contrary, recognized as necessary that the resolution of problems of grave public concern and consequence often requires accomplishment in graduated steps and progressive stages. That recognition finds exquisite identity here.

These petitioners respectfully submit that the foregoing facts, reasons, and argument should have persuaded the state court initially, to recognize the existence of the new (1970) Illinois Constitution; appreciate the integral relationship between Article IX-A of the 1870 Illinois Constitution and the new (1970) Constitution; apply the established rule of law whose application these petitioners respectfully submit, is compelled in that State; and accordingly hold Article IX-A to be valid. Failure by that court to do so resulted in a judgment wholly inconsistent with the public policy of Illinois, contrary to the law of Illinois, and refuted by the teachings and decision of this Court.

III.

THE OPINION OF THE STATE COURT RESULTS IN THE DENIAL TO THESE PETITIONERS OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW WITHIN THE INTENT OF THOSE CLAUSES OF THE FOURTEENTH AMENDMENT, FOR THE REASON THAT THE PRESENTLY STANDING OPINION OF THAT COURT DENIES THESE PETITIONERS A FAIR TRIAL WITHIN THE DEFINITION DECLARED BY THIS COURT.

These petitioners respectfully submit that the following chronology demonstrates, best of all, the intimacy and

integral relationship between Article IX-A of the 1870 Constitution, and the new (1970) Constitution, and that the embodiment of both, standing together, declare the public policy of the State of Illinois, and makes manifest the error in the judgment entered by the State court which totally ignored the existence of the new (1970) Constitution.

1970 CONSTITUTION:

December 9, 1969 — Illinois Sixth Constitutional Convention Convened.

October 1, 1970 — Constitutional Convention Adopted New Constitution and Adjourned.

December 15, 1970 — Adopted by Electorate at Special Election.

July 1, 1971 — To Be In Effect.

ARTICLE IX-A (1870 Constitution):

February 27, 1970 — Disseminated to Electorate, Notice, Etc. of Proposed Amendment.

November 3, 1970 — Approved by Electorate.

November 25, 1970 — Declared Adopted and Became Part of 1870 Constitution.

January 1, 1971 — To Be In Effect.

JUDGMENT OF STATE COURT:

July 9, 1971.

In addition to the reasons assigned under the preceding point, the concurrence, and immediacy of occurrence, of both Article IX-A to the 1870 Constitution and the new (1970) Constitution, as shown above, without more, demonstrates their consummate singleness; and totally rejects the State court's attempt at their divorcement.

It appears that the new (1970) Constitution was submitted to and adopted by the electorate of that State on

December 15, 1970. That Constitution declares the abolishment of all personal property tax in that State, and publishes the program for such eventual total removal, and the method employed for such accomplishment. As heretofore observed, paragraph (b), section 5 of Revenue Article IX of the new (1970) Constitution specifically prohibits the imposition of any tax theretofore abolished. It reads as follows:

"Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated."

If Article IX-A, then, is not an integral part of, and the first step in the program declared to be the public policy in that State for the eventual abolishment of all those taxes, then no need would exist for such a specific admonition in the new (1970) Constitution.

Of course, the public policy of Illinois in regard to the passage and purpose of Article IX-A cannot be determined absent examination of the Revenue Article of its new (1970) Constitution.

Again, it defies reason to assume that the electorate were unaware of the identity between Article IX-A and the new (1970) Constitution, and the purpose of both to accomplish the ultimate removal of that tax from all in accordance with the program which they established.

Every media, in every way, informed the electorate as to every component, proposed and adopted in both Article IX-A to the 1870 Constitution, and the new (1970) Constitution, from the date Illinois' Sixth Constitutional Convention convened on December 9, 1969, through the approval of Article IX-A to the 1870 Constitution, on November 3, 1970, and through the adoption, less than five (5) weeks after that, of the new Constitution, on December 15, 1970.

Of course, determination of the public policy of Illinois demands measurement by its new (1970) Constitution.

Indeed, why the need, to submit Article IX-A to the electorate on November 3, 1970, when the new (1970) Constitution was to be submitted to them just a few weeks later on December 15, 1970, unless the passage of Article IX-A was an integral factor: its precedent occurrence anticipating the Revenue Article in the new (1970) Constitution, and subsumed by the Revenue Article of the 1970 Illinois Constitution.

Of course, the public policy of the State of Illinois demands consideration of Illinois' new (1970) Constitution.

The failure of the State court to observe and apply these considerations constitutes error so manifest that such oversight, indeed, denies to these petitioners the fundamental right to a fair trial assured them by the due process and equal protection clauses of the Fourteenth Amendment.

These petitioners respectfully direct the Court's attention to the Illinois Attorney General's change in position as reflected in his Petitions for Certiorari on the one hand and his Brief on the other.

At page 41 of his amended petition the Attorney General states, "Either the dissenting opinion of Justice Davis was correct, or that the decision of Judge Donovan in the *Shapiro* case was correct."

In the brief which the Attorney General filed, he urged that *only* the dissent of Justice Davis was correct.

Consequently, these Petitioners adopt the issues and presentation of those issues abandoned by the Attorney General; that is, either of the alternative positions — that of Judge Donovan or that of Mr. Justice Davis is correct AND, in the event this Court should determine, contrary

to the interpretation of the State's Attorney of Cook County in this regard, that the term "Individuals" encompasses unincorporated businesses as well: that distinction is a valid one and not offensive to the United States Constitution for the reasons assigned by Governor Richard Ogilvie in his *amicus* brief.

CONCLUSION

For the reasons and upon the grounds stated, these Petitioners respectfully urge this Court to reverse the decision of the Illinois Supreme Court.

Respectfully submitted,

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MICHAEL RODAK, JR., CLERK

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1972.

No. 71-685

ROBERT J. LEHNHAUSEN,
Petitioner,
vs.

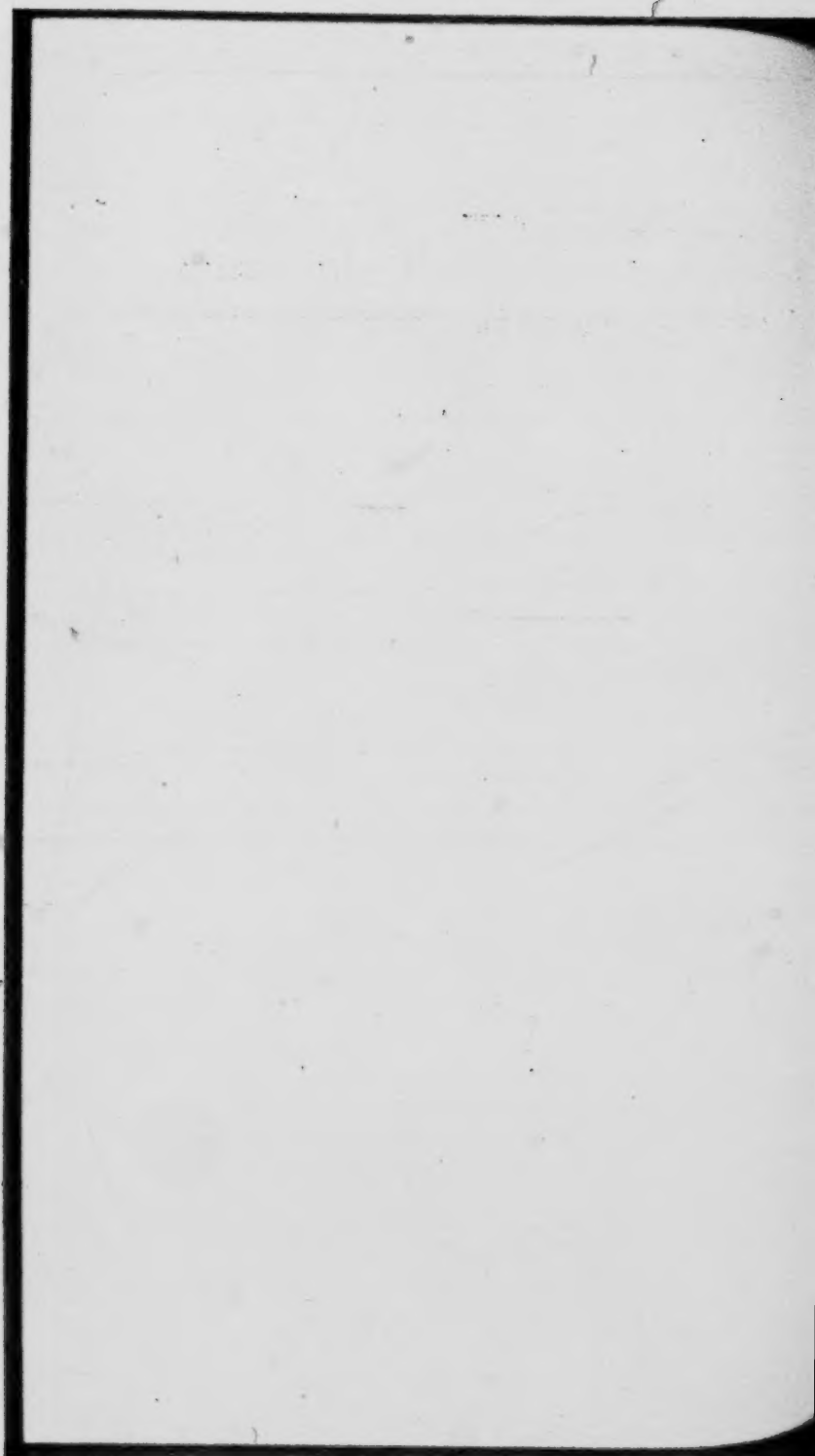
LAKE SHORE AUTO PARTS CO., INC., ET AL.,
Respondents.

**(ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ILLINOIS.)**

REPLY BRIEF OF THE PETITIONER.

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Petitioner,

vs.

LAKE SHORE AUTO PARTS CO., INC., ET AL.,
Respondents.

(ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ILLINOIS.)

REPLY BRIEF OF THE PETITIONER.

ARGUMENT.

The respondent's position is threefold: that there is no reasonable governmental objective underpinning the exemption of individuals from the payment of an ad valorem tax on personalty; that the fourteenth amendment blanketly prohibits differentiation between individuals and corporations for the purpose of personal property taxation; and that as a litigant in this action, he is entitled to the financial reward of total exemption from the payment of the property tax. Each of these arguments is fatally defective.

It should be noted at the outset that both the petitioner and respondent agree that the Illinois tax on personal property prior to the adoption of Article IX-A was virtually im-

possible to administer and resulted in grossly disproportionate assessment and payment of the tax among residents of the various counties of the state. While individuals in some counties paid no tax, individuals residing in other areas were assessed to the full extent provided by the statute. Indeed, from the figures available, the only uniformity in the administration of this tax on a state-wide basis occurred in the assessment of corporations.

Since this tax is a major source of revenue for the State of Illinois, its immediate total abolition was impossible. However, rather than allowing the inequities inherent in the assessment of the tax to continue, the Illinois legislature determined that a course of action which would ultimately result in the total elimination of this tax while providing some immediate relief was necessary. Thus, the legislature proposed and the voters by referendum adopted an amendment to the Illinois Constitution exempting individuals from the payment of the tax on personalty. Ill. Const. (1870), Art. IX-A.

As the petitioner demonstrated in his original brief, this case is somewhat unique in that the objectives sought to be accomplished through the adoption of Article IX-A are clearly delineated in the printed explanation and arguments supporting and opposing the amendment which were submitted to the Illinois voters along with the proposed constitutional amendment. See Petitioner's Brief 12-14; Petition 10-15. The express purpose of Article IX-A is to effectuate the elimination of the ad valorem tax on personalty by exempting initially those persons upon whom the tax operated most unfairly—individuals. The underlying motivation to encourage a total revision of the Illinois taxing structure in this field resulted in the inclusion of Article IX sect. 5(b) and (c) in the new Illinois Constitution which was subsequently enacted and which requires the total abolition of the personal property tax in

Illinois before January 1, 1979. Ill. Const., Art. IX, sect. 5(b), (c).¹

Thus, as the first step toward accomplishing the stated objective of totally eliminating the personal property tax, the Illinois legislature formulated a classification by which those persons defined under Illinois law as individuals were exempted from payment of the tax.

In an argument which is notable for its lack of binding precedent,² respondent alleges that such a classification

1. Respondent seeks to enhance his position by arguing that it is doubtful that the personal property tax ever will be abolished totally. This argument ignores the clear and mandatory language of Article IX, section 5(c) of the 1970 Constitution which provides:

"On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971."

2. The respondent places heavy reliance on the California Railroad Tax cases: *San Mateo County v. Southern Pacific R. Co.*, 13 Fed. 722 (1882), app. dismissed per stip., 116 U. S. 138 (1885); and *Santa Clara County v. Southern Pacific R. Co.*, 18 Fed. 385 (1883), aff'd. on other grounds, 118 U. S. 394 (1886); and elevates them to "Supreme Court status" (Resp's Br. 25) on the authority of the opinion in *Quaker City Cab. Co. v. Pennsylvania*, 277 U. S. 389 (1928) and his conjecture that the dissenting Justices would have concurred in that opinion had they agreed with respondent's characterization of the tax there in question. The necessity of such an argument reflects the inherent weakness of respondent's position.

The California Railroad Tax cases arose under a state constitutional provision requiring uniform taxation of real property proportionately to its value. The cases involved the validity of a state statute, which despite the California constitutional provision, denied railroads holding real property a deduction for mortgages held on the property while allowing the deduction to all others holding such property. The state court struck down the statute and this Court affirmed the decision without reaching the question presented by the instant case.

Respondent's attempt to rationalize the dissents of Mr. Justices Holmes, Brandeis and Stone in *Quaker City Cab Co. v. Pennsylvania*, *supra*, out of existence is equally ill-founded. It ignores

when made for property tax purposes is impermissible under the equal protection clause of the fourteenth amendment. In effect, the respondent adopts the superficial reasoning of the Supreme Court of Illinois that a distinction between "individuals" and "corporations" for this purpose classifies solely upon the identity of the owner. This conclusion ignores the fact that the identity of a corporate owner cannot be separated from the advantages which enure from the privilege of doing business in the corporate form. These advantages are significant (See *Pet.'s Br. 15*), are unavailable to individuals, and underlie the separate classification of corporations and individuals for the purpose of taxation. This Court has repeatedly upheld such classifications for state taxing purposes. See *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911); *Ft. Smith Lumber Co. v. Arkansas*, 251 U. S. 532 (1920); *Lawrence v. State Tax Commission*, 286 U. S. 276 (1932).

In an ill-conceived attempt to undermine the validity of petitioner's reliance on the ruling of this Court in *Allied Stores of Ohio Inc. v. Bowers*, 358 U. S. 522 (1959) that a classification based solely on the ownership of property is valid under the equal protection clause if founded upon reasonable differences, respondent attributes to the petitioner the theory that *Allied Stores of Ohio, Inc. v. Bowers* overruled the decision in *Wheeling Steel Corp. v. Glander*, 337 U. S. 502 (1949). This is not the petitioner's position.

Both the *Glander* case and *Reserve Life Ins. Co. v. Bowers*, 380 U. S. 258 (1965) are clearly distinguishable from the *Allied Stores* case. In those cases, Ohio attempted to impose an ad valorem property tax on the intangibles

the basic premise of those dissents that the very real and important differences between conducting a business in the corporate capacity and as an individual are a sufficient basis upon which a state may separately classify corporations and individuals for purposes of taxation and may impose upon corporations a heavier tax burden by means of "any of the familiar kinds of taxes" (277 U. S. at 408) which of course would include an ad valorem tax on personality.

of domesticated foreign corporations while exempting both residents and domestic corporations. This Court held that there was no valid basis for distinguishing between foreign corporations and domestic corporations once the state had admitted the foreign corporations to transact business within the state and had thus placed them on an equal footing with its domestic corporations.

The decision in *Allied Stores of Ohio, Inc v. Bowers* rests squarely on the ground that the separate classification of resident and nonresident owners of merchandise held for storage in local warehouses and the exemption from ad valorem taxation of the property of the nonresidents only effectuated the valid state policy of encouraging industry to locate within the state. In that case, as in the instant case, a classification based on the ownership of property is valid when based upon reasonable differences and when enacted for the purpose of furthering a valid state policy or objective.

Respondent's final contention is that Article IX-A of the Illinois Constitution of 1870 exempting individuals from the payment of the ad valorem personal property tax does not offend the fourteenth amendment. Rather, he argues, it is the Revenue Act of 1939, Ill. Rev. Stat. 1939, Ch. 120, § 18 providing for the uniform taxation of all real and personal property located within the State which is invalid under the equal protection clause. This argument apparently is founded on the premise that the respondent is entitled to some financial reward in return for pursuing the instant litigation. (See Resp's. Br. 50-60.)³ In this case, he asserts that the proper reward is the

3. The cases upon which respondent relies to support this theory are all clearly distinguishable on the basis that in each of those cases, the state attempted to exact some penalty as the price of a litigant asserting his right to challenge a state regulation. Here, there has been no such attempt on the part of the State of Illinois. The respondent's position with respect to his liability to pay the personal property tax is no different than it was prior to the enactment of Article IX-A. He was liable then and is liable now for the payment of that tax under Illinois law.

total exemption of individuals and corporations from the personal property tax.

This theory ignores the fact that the two complaints challenging Article IX-A are the basis for this litigation. The provisions of the Revenue Act of 1939 prior to the enactment of Article IX-A have not been challenged herein. The sole issue upon which this Court granted certiorari was whether a state constitutional provision which distinguishes between corporations and individuals for the purpose of imposing an ad valorem tax on personal property violates the equal protection clause of the fourteenth amendment? That is the only proper issue before this Court for decision.⁴

CONCLUSION.

For the foregoing reasons as well as for the reasons asserted in the petitioner's brief, the petitioner respectfully requests this Court to reverse the decision of the Supreme Court of Illinois in this case.

Respectfully submitted,

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JAYNE A. CARR,

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Of Counsel.

4. The respondent improperly attempts to raise an issue concerning the validity of the class action aspects of the *Barrett v. Shapiro* case, No. 71-691, under the due process clause. This issue was not raised by either petitioner in their respective petitions for certiorari. Therefore, that issue is not properly before this Court for decision. *Ryan v. United States*, 379 U. S. 61 (1964); *Rorick v. Devon Syndicate, Ltd.*, 307 U. S. 299 (1939); *Steele v. Drummond*, 275 U. S. 199 (1927).

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(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LEHNHAUSEN, DIRECTOR, DEPARTMENT OF
LOCAL GOVERNMENT AFFAIRS OF ILLI-
NOIS *v.* LAKE SHORE AUTO PARTS
CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 71-685. Argued January 15, 1973—Decided February 22, 1973*

An Illinois constitutional provision subjecting corporations and similar entities, but not individuals, to *ad valorem* taxes on personalty comports with equal protection requirements, the States being accorded wide latitude in making classifications and drawing lines that in their judgment produce reasonable taxation systems. *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, disapproved. Pp. 3-10.

49 Ill. 2d 137, 273 N. E. 2d 592, reversed.

DOUGLAS, J., delivered the opinion for a unanimous Court.

*Together with No. 71-691, *Barrett, County Clerk of Cook County, Illinois, et al. v. Shapiro et al.*, also on certiorari to the same court.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 71-685 AND 71-691

Robert J. Lehnhausen,
Petitioner,
71-685 v.
Lake Shore Auto Parts Co.
et al.

Edward J. Barrett, County Clerk
of Cook County, Illinois,
et al., Petitioners,
71-691 v.
Clemens K. Shapiro et al.

On Writs of Certiorari
to the Supreme Court
of Illinois.

[February 22, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1970 the people of Illinois amended her constitution adding Art. IX-A to become effective January 1, 1971, and reading:

"Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

There apparently appeared on the ballot when Art. IX-A was approved the following:

"The amendment would abolish the personal property tax by valuation levied against individuals. It would not effect the same tax levied against corporations and other entities not considered in law to be individuals. The amendment would achieve this result by adding a new article to the Constitution of 1870, Article IX-A, thus setting aside existing

provisions of Article IX, Section 1, that require the taxation by valuation of all forms of property, real and personal or order, owned by individuals and corporations."

Respondent Lake Shoe Auto Parts Co., a corporation, brought an action against Illinois officials on its behalf and on behalf of all other corporations and "non-individuals" subject to the personal property tax, claiming it violated the Equal Protection Clause of the Fourteenth Amendment since it exempts from personal property taxes all personal property owned by individuals but retains such taxes as to personal property owned by corporations and other "non-individual." The Circuit Court held Art. IX-A unconstitutional as respects corporations by reason of the Equal Protection Clause of the Fourteenth Amendment.

Shapiro and other individuals also brought suit alleging they are natural persons who own personal property, one for himself and his family, one as a sole proprietor of a business, and one as a partnership. A different trial judge entered an order in these cases dismissing the complaints except as to Shapiro and members of his class. The trial judge held that all other provisions of Illinois law imposing personal property taxes on property owned by corporations and other "non-individuals" were unaffected by Art. IX-A, in spite of the statement on the ballot, quoted above.

All respondents in both cases appealed to the Illinois Supreme Court, which held that Art. IX-A did not affect all forms of real and personal property taxes but only personal property taxes on individuals, which it construed to mean "ad valorem taxation of personal property owned by a natural person or by two or more persons

¹ In 1969 the Illinois Legislature had provided for the submission of the proposed amendment to a referendum vote.

as joint tenants in common." 48 Ill. 2d 137, 148. As so construed the Illinois Supreme Court held that the tax violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 151, one Justice dissenting.² The cases are here on petitions for writs of certiorari which we granted. 406 U. S. —.

The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities different from the others. The test is whether the difference in treatment is an invidious discrimination. *Harper v. Virginia Board of Elections*, 383 U. S. 663, 666. Where taxation is concerned and no specific federal right, apart from equal protection, is imperilled,³ the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. As stated in *Allied Stores of Ohio v. Bowers*, 358 U. S. 522, 526-527:

"The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster

² The result was either to reverse with directions to dismiss the complaints or to affirm judgment that did dismiss the complaints. Those two cases were heard by the Illinois Supreme Court along with a petition to file original suit with that court by one Maynard, who owned nonbusiness personal property and by three school districts. That petition was dismissed.

³ Classic examples are the discriminatory taxes on newspapers struck down under the First Amendment (*Grosjean v. American Press Co.*, 797 U. S. 733) or by reason of the fact that they discriminated against interstate commerce or required license taxes to engage in interstate commerce. See *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157.

their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity to reference to composition, use or value."

In that case we used the phrase "palpably arbitrary" or "invidious" as defining the limits placed by the Equal Protection Clause on state power. *Id.*, at 530. State taxes which have the collateral effect of restricting or even destroying an occupation or a business have been sustained, so long as the regulatory power asserted is properly within the limits of the state-federal regime created by the Constitution. *Magnano Co. v. Hamilton*, 292 U. S. 40, 44-47. When it comes to taxes on corporations and taxes on individuals great leeway is permissible so far as equal protection is concerned. They may be classified differently with respect to their right to receive or earn income. In *Lawrence v. State Tax Commission*, 286 U. S. 276, 283, a state tax relieved domestic corporations of an income tax derived from activities carried on outside the State, but imposed the tax on individuals obtaining such income. We upheld the tax against the claim that it violated the Equal Protection Clause, saying:

"We cannot say that investigation in these fields would not disclose a basis for the legislation which would lead reasonable men to conclude that there

is just ground for the difference here made. The existence, unchallenged, of differences between the taxation of incomes of individuals and of corporations in every federal revenue act since the adoption of the Sixteenth Amendment demonstrates that there may be." *Id.*, at 283-284.

It is true that in *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, the Court held that a gross receipts tax levied on corporations doing a taxi business violated the Equal Protection Clause of the Fourteenth Amendment, when no such tax was levied on individuals and partnerships operating taxicabs in competition with the corporate taxpayers. Justice Holmes, Justice Brandeis, and Justice Stone dissented. *Id.*, 403-412. Justice Holmes stated:

"If usually there is an important difference of degree between the business done by corporations and that done by individuals, I see no reason why the larger businesses may not be taxed and the small ones disregarded, and I think it would be immaterial if here and there exceptions were found to the general rule. . . . Furthermore if the State desired to discourage this form of activity in corporate form and expressed its desire by a special tax I think that there is nothing in the Fourteenth Amendment to prevent it."

Each of these dissenters thought *Flint v. Stone Tracy Co.*, 220 U. S. 107, should govern *Quaker City Cab*. The *Flint* case involved a federal tax upon the privilege of doing business in a corporate capacity, but it was not laid on businesses carried on by a partnership or private individual. It was therefore contended that the tax was "so unequal and arbitrary" as to be beyond the power of Congress. *Id.*, at 158. We had not yet held that

the Fifth Amendment in its use of due process carries a mandate of equal protection.⁴ But the Court in *dictum* stated: that it could not be said,

"... even if the principles of the Fourteenth Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxes, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals." *Id.*, at 161-162.

⁴ See *Bolling v. Sharpe*, 347 U. S. 497, decided May 17, 1954, which held that federal discrimination (in that case racial in nature) may be so arbitrary as to be violative of due process as used in the Fifth Amendment.

While *Quaker City Cab* followed *Flint*, cases following *Quaker City Cab* have somewhat undermined it. *White River Co. v. Arkansas*, 279 U. S. 692, sustained a state statute for collection of back taxes on lands owned by corporations but not individuals. The Court sustained the tax. Justice Butler, Chief Justice Taft, and Justice van Devanter dissented, asserting that *Quaker City Cab* was not distinguishable. The majority made no effort to distinguish *Quaker City Cab* beyond saying that it did not involve, as did *White River*, a tax on back taxes.

In *Rapid Transit Co. v. New York*, 303 U. S. 573, an excise tax was levied on every utility but not on other business units. In sustaining the tax against the claim of lack of equal protection the Court said:

"Since carriers and other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions." *Id.*, at 579.

We reached the same result in *Nashville C. & St. L. R. Co. v. Bronny*, 310 U. S. 362, where Tennessee had used one system for making assessments under its ad valorem tax law as respects most taxpayers and a totally different one for public service corporations. So far as equal protection was concerned we said that the grievance of the particular complainant was "common to the whole class" and not "invidious to a particular taxpayer."⁵ *Id.*, at 368.

⁵ In *Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, a State classified chain stores for purposes of a chain store tax according to

Approval of the treatment "with that separateness" which distinguishes public service corporations from others, *id.*, at 365, leads us to conclude in the present cases that making corporations and other like entities liable for ad valorem taxes on personal property but not individuals does not transcend the requirements of equal protection.

In *Madden v. Kentucky*, 309 U. S. 83, a State laid an ad valorem tax of 50¢ per \$100 on deposits in banks outside the State and only 10¢ for \$1,000 in deposits within the State. The classification was sustained against the charge of invidious discrimination, the Court noting that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Id.*, at 88. There is a presumption of constitutionality which can be overcome "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Ibid.* And the Court added, "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Ibid.* That

the number of stores—inside and outside the State. The Court sustained the tax saying, "The statute bears equally upon all who fall into the same class, and this satisfies the guaranty of equal protection." *Id.*, at 424. In *Carmichael v. Southern Coal Co.*, 301 U. S. 495, a State laid an unemployment tax on employers, excluding, *inter alia*, agriculture, domestic service, crews of vessels on navigable waters, eleemosynary institutions. The Court sustained the tax saying "This Court has repeatedly held that inequalities which result from singling out of one particular class for taxation or exemption infringe no constitutional limitation." *Id.*, at 59. And it added "A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable slate of facts which would support it. *Ibid.*

idea has been elaborated. Thus in *Carmichael v. Southern Coal Co.*, 301 U. S. 495, the Court in sustaining an unemployment tax on employers^{*} said:

"A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id.*, at 510.

Illinois tells us that the individual personal property tax was discriminatory, unfair, almost impossible to administer, and economically unsound. Assessment practices varied from district to district. About a third of the individuals paid no personal property taxes at all, while the rest paid on their bank accounts, automobiles, household furniture and other resources, and in rural areas they paid on their livestock, grain, and farm implements as well. As respects corporations, the State says, the tax is uniformly enforceable. Illinois says, moreover, that Art. IX-A is only the first step in totally eliminating the ad valorem personal tax by 1979 but for fiscal reasons it was impossible to abolish the tax all at once.

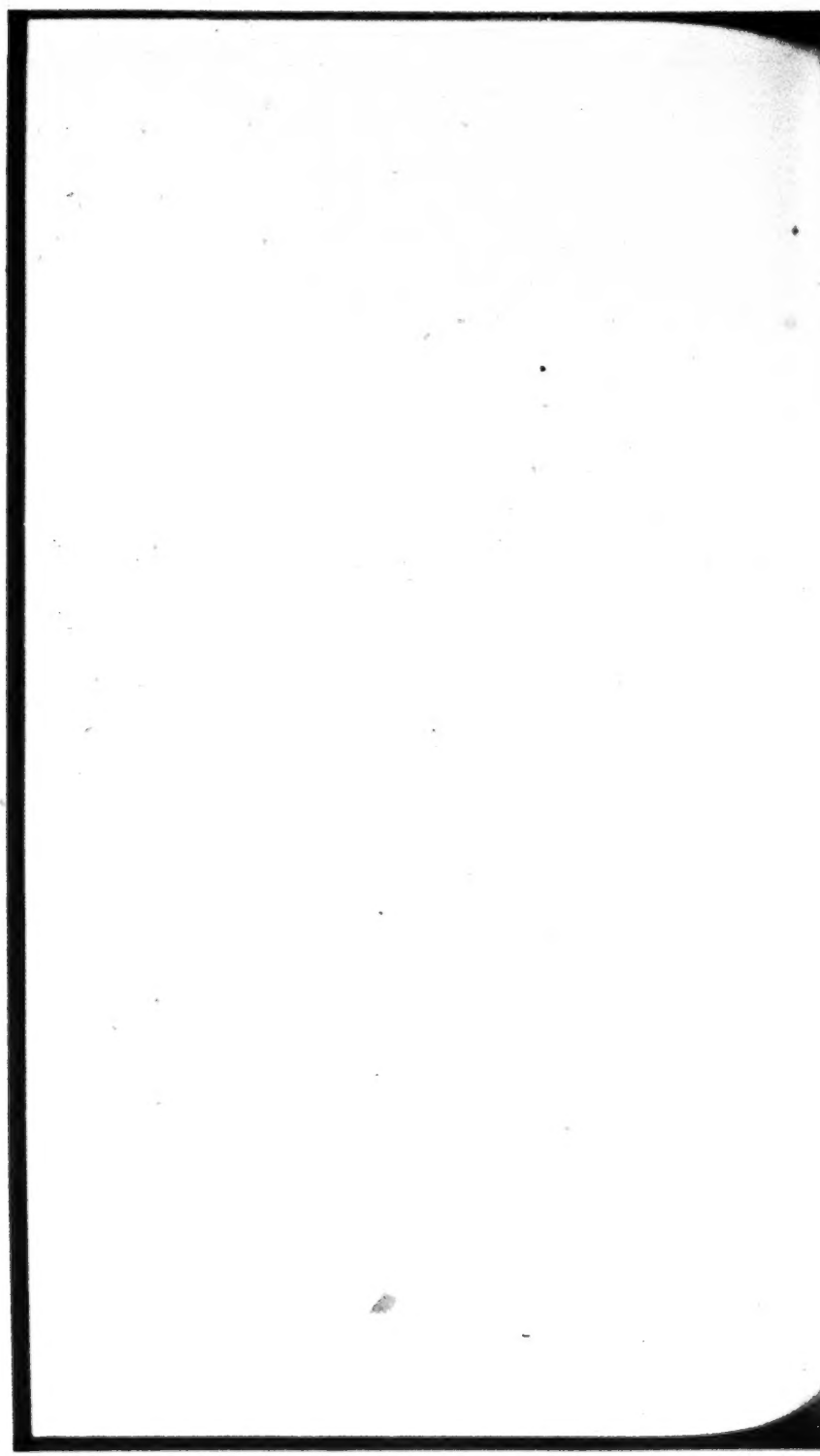
We could strike down this tax as discriminatory only if we substituted our judgment on facts of which we can

^{*} Note 5, *supra*.

be only dimly aware for a legislative judgment that reflects a vivid reaction to pressing fiscal problems. *Quaker City Cab Co. v. Pennsylvania* is only a relic of a bygone era. We cannot follow it and stay within the narrow confines of judicial review, which is an important part of our constitutional tradition.

Reversed.





IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

ROBERT J. LEHNHAUSEN, Director of Department of
Local Government Affairs of the State of Illinois,

Petitioner,

No. 71-685

vs.

LAKE SHORE AUTO PARTS CO., et al.,

Respondent.

EDWARD J. BARRETT, County Clerk of
Cook County, Illinois, et al.,

Petitioners,

No. 71-691

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

On Writs Of Certiorari To The Supreme Court Of Illinois.

PETITION FOR REHEARING

and

MOTIONS TO MODIFY JUDGMENT AND OPINION

Your Petitioner, Lake Shore Auto Parts Co., Respondent in No. 71-685, petitions this Court for a rehearing of this cause, and, in the alternative, moves this Court for the entry of orders modifying the judgment entered on February 22, 1973, and the opinion filed on that date.

I.

**Suggestions In Support Of Motion
To Modify Judgment**

The judgment of this Court is that the judgments heretofore entered by the Illinois Supreme Court be reversed, without remand or further direction to the court below. The judgment of this Court is applicable, presumably, both to *Lehnhausen v. Lake Shore Auto Parts Co.* (No. 71-685) and to *Barrett v. Shapiro* (No. 71-691).

In the *Lake Shore* case that judgment presents no problem of interpretation inasmuch as the basis of this Court's decision is made clear in its opinion.

Your Petitioner suggests, however, that as respects *Barrett v. Shapiro* the judgment of reversal, without more, necessarily raises grave problems of the utmost concern to the People and the Courts of Illinois.

The opinion of this Court does not concern itself with any of the issues raised by the various parties to *Barrett v. Shapiro*,—issues which were entirely different from, and seemingly unrelated to, those argued in *Lehnhausen v. Lake Shore*.⁽¹⁾ The judgment of the Illinois Supreme Court in *Shapiro*, in relevant part, was to reverse the order of the trial court in that case insofar as the trial court had denied a motion of the defendant

⁽¹⁾ The central issue argued by the parties to *Lehnhausen v. Lake Shore* was the validity, under the 14th Amendment, of the discriminatory taxing scheme created as a result of the adoption of Article IX-A of the Illinois Constitution. The opinion of this Court is devoted exclusively to that question. Petitioner's brief on the merits in the *Shapiro* case (and his Petition for Certiorari as well) sought to raise three entirely different points,—none of which are touched upon in the opinion of this Court. The summary captions of these three points, as taken from that brief, are set out in the Appendix hereto.

State's Attorney to dismiss the complaint as to the plaintiff Shapiro (49 Ill. 2d 137, at pp. 151-2; App. at p. 32⁽²⁾).

By now reversing the judgment of the Illinois Supreme Court, without remand, this Court has apparently reinstated that order of the trial court. *National Nut Co. of California v. Kelling Nut Co.*, 61 F. Supp. 76, 80 (N.D. Ill. 1945); *Coit v. Sistare*, 84 Atl. 119 (Conn. 1912); *Peak v. The People*, 71 Ill. 278, 280 (1874); 2 Freeman on Judgments (5th ed. 1925), §1167, p. 2417. Cf. *United States Trust Co. v. New Mexico*, 183 U.S. 535, 539-40 (1901).

The sustaining of Shapiro's complaint in the trial court was attributable to the trial judge's acceptance of Shapiro's contention that the word "individuals", as it appeared in Article IX-A of the Illinois Constitution, was intended only "to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families." (App., at p. 16). Moreover, the trial judge specifically decreed that "said Amending Article IX-A declares its prohibition *exclusively* as to any personal property tax on the personal property owned by individuals *and used for their personal enjoyment and that of their families.*" (App., at p. 17. Emphasis added.)

Thus the judgment of the trial court in *Barrett v. Shapiro* embraced the narrowest conceivable interpretation of the word "individuals",—an interpretation which was decisively rejected by the Illinois Supreme Court (49 Ill. 2d 137, at pp. 146-8; App., at pp. 27-28).

(2) References herein to "App." are to the printed Appendix filed by the Petitioner in *Lehnhausen v. Lake Shore Auto Parts Co.*, No. 71-685.

It therefore appears that a necessary consequence of this Court's judgment in *Barrett v. Shapiro*, as that judgment now stands, will be to preclude any contention in the state courts of Illinois that the word "individuals" can be interpreted so as to include categories such as the following: natural persons engaged in business as sole proprietors, or as farmers, or in the practice of a profession; natural persons holding personal property for investment purposes; decedents' estates and trusts; and partnerships organized for business, investment or professional purposes wherein one or more of the partners is a natural person.^(*)

Petitioner earnestly believes that it was not the intention of this Court to adopt any such narrow definition of the word "individuals",—or, for that matter, to embrace any particular definition of the word inasmuch as the interpretation of the language of a State Constitution has consistently been held to be a matter for determination by the courts of that State.

Furthermore, as the judgment of this Court now stands, its effect, presumably, is to finally terminate *Barrett v. Shapiro* and preclude any further proceedings therein in the state courts of Illinois.

It may well be that this Court's judgment of reversal in *Barrett v. Shapiro* is attributable to an understandable confusion created by the peculiar circumstance that the State's Attorney of Cook County, the only party to that case who sought review in this Court of the Illinois

(*) In the course of its opinion below, the Illinois Supreme Court did undertake a partial definition of the word "individuals". (49 Ill. 2d 137, at p. 148; App., at p. 28). While that definition does preclude any contention that the word implies sole ownership by only one person, it leaves unanswered a host of other problems raised by the word.

Supreme Court's decision, was the *successful* party in the Illinois Supreme Court,—indeed, he was the only wholly successful litigant in these consolidated cases. The judgment of the Illinois Supreme Court was a direction to dismiss the complaint as to all the plaintiffs in *Shapiro*,—precisely the relief which the State's Attorney had requested in his trial court pleadings and motion. A necessary result of the judgment of this Court, as it now stands, is that the Petitioner in *Barrett v. Shapiro* has succeeded in overturning a decision in his own favor. Why he should want to do this is a matter not readily apparent from the record, nor from his Petition for Certiorari or brief on the merits filed in this Court.

There is nothing in the opinion of this Court which suggests that the Illinois Supreme Court erred in its judgment dismissing the complaint in the *Shapiro* case.⁽⁴⁾ On the face of it, therefore, it would seem that the appropriate judgment here would be to affirm,—rather than to reverse. Your Petitioner respectfully points out, however, that a simple affirmance of the judgment below in *Barrett v. Shapiro* will introduce an untoward complication into future litigation in the state courts of Illinois,—litigation which appears inevitable as the scope of the word "individuals" is sought to be established on a case-

⁽⁴⁾ That judgment was based on several grounds, none of which involved an interpretation of the United States Constitution, and none of which is in any way offensive to the opinion of this Court. The Illinois Supreme Court rejected each of the various arguments advanced by one or another of the *Shapiro* plaintiffs (including the argument that Article IX-A had abolished *all* property taxation in Illinois). If there is any ambiguity in the opinion on this score it is probably attributable to the *Shapiro* complaint. After setting out a hodge podge of mutually incompatible theories, the *Shapiro* plaintiffs requested the court to consider the relief prayed for "to be applicable only to those of these plaintiffs to whom such contentions and relief prayed would not be inimical." (Rec. p. 273)

by-case basis. This complication is attributable to the trial court's finding that the various *Shapiro* plaintiffs were proper representatives of the classes they purported to represent and that the case was a proper class action (App. at p. 16). If that finding is valid it would of course follow that the dismissal of the *Shapiro* complaint is *res judicata* on the merits of the claims asserted as to all class members. Consequently, all sole proprietors and partners would be forever barred from asserting their right to a tax exemption under the Illinois Constitution, —if the order dismissing the complaint were simply to be affirmed by this Court.

While Lake Shore is confident that the class action findings are void for want of due process of law (see Lake Shore's brief on the merits, at pp. 60-65), and hence subject to collateral attack, it also believes that the many problems created by this order should be disposed of in subsequent state court proceedings in the *Shapiro* case itself. That can best be accomplished, Lake Shore suggests, by vacating the judgment of the Illinois Supreme Court in *Barrett v. Shapiro* and remanding the case to that court for further proceedings in accordance with the opinion herein.

Furthermore, remand to the Illinois Supreme Court hopefully will permit that court to devise some solution to the very serious problems which now confront all taxing bodies, public officials and taxpayers as a consequence of the creation throughout the state of innumerable escrows or sequestrations of tax funds in the hands of the various County Collectors in the 102 Illinois counties,—now amounting to many millions of dollars. Some of those funds were created pursuant to a statute enacted by the Illinois legislature during the pendency of this suit. (Ill. Rev. Stat., Ch. 120, §676.01, 1972 Supp The

text is reproduced at page 2a of the Appendix hereto). Others were created pursuant to orders entered in the many suits instituted in different counties, either on the initiative of public officials or on that of taxpayers. (For example, as noted at page 4 of Lake Shore's brief on the merits, the trial court in the *Shapiro* case, while that case was pending before this Court, entered orders purporting to sequester taxes paid by certain classes of personal property owners.) The wording of these many orders vary greatly among themselves, and from the wording of the statute. All of these funding orders, and the statute itself, will clearly require judicial interpretation in order to ascertain which taxpayers are entitled to refunds and in what amounts, as well as judicial supervision of the entire refunding process. (The statute, it may be noted, purports to provide for "automatic full repayment" but that appears to be a statement of wishful thinking.) If the trial courts in each county undertake their own separate determinations as to the meaning of the word "individuals", and as to which taxpayers are entitled to refunds, it is inevitable that many conflicting interpretations will arise, resulting in much confusion, expense and great delay in the making of refunds until such time as the state Supreme Court is given an opportunity to make a definitive interpretation.

Wherefore, your Petitioner prays that the judgment entered by this Court on February 22, 1973, in *Barrett v. Shapiro*, No. 71-691, be modified,—either by affirming the judgment of the Illinois Supreme Court (which judgment dismissed the complaint as to all plaintiffs in that case),—or, preferably, by vacating the judgment entered below and either remanding the case to the Illinois Supreme Court with directions to proceed in a manner not inconsistent with the opinion herein or else dismissing

the writ of certiorari on the ground that it was improvidently granted. Any form of modification will enable the state courts of Illinois to pass upon those issues, including issues of state constitutional interpretation, which were not decided by this Court and which involve no apparent federal question.

The action herein requested by your Petitioner is amply supported by precedent in this Court:

Parks v. Simpson Timber Co., 389 U.S. 909 (1967) (amending a prior judgment, reported at 388 U.S. 459, so as to provide that the lower court's judgment be vacated, rather than reversed, and directing that the case be remanded so as to permit the lower court to pass upon undecided issues);

Union Trust Co. v. Eastern Airlines, 350 U.S. 962 (1956) (modifying the prior judgment of reversal, reported at 350 U.S. 907, by adding a remanding order so as to permit the lower court to pass upon undecided issues);

Klapprott v. United States, 336 U.S. 942 (1949) (modifying prior judgment, reported at 335 U.S. 601, so as to conform that judgment to the Court's opinion).

See also, 28 U.S.C. §2106.

II.

Argument In Support Of Petition For Rehearing

No one could plausibly question this Court's statement that only "palpably arbitrary" or "invidious" classifications for tax purposes fall within the prohibition of the equal protection clause. Nor does Lake Shore have any inclination to dispute the court's adoption of the rule that "there is a presumption of constitutionality which can be overcome only by the most explicit demonstration

that a classification is a hostile and oppressive discrimination against particular persons and classes."

In this case, however, the legislature of Illinois, which originally drafted Article IX-A and submitted it to the people for ratification, was unable to think of a single reason with which to justify the discrimination established by that Article. Although that legislature prepared an elaborate "Official Argument" in support of the Amendment (Lake Shore's brief on the merits, at p. 1a), and although that Official Argument is filled with denunciation directed against the ad valorem personal property tax, it contains not one word which even remotely suggests a rationale for the discrimination.

Furthermore, the Illinois Supreme Court (which, Lake Shore respectfully suggests, was in a position to be more than "dimly aware" of the facts upon which it based its judgment) expressly found that:

"It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others." (49 Ill. 2d 137, at p. 151; App., at pp. 31-32).

Yet this Court now strikes down the judgment of the Illinois Supreme Court on the ground, apparently, that somewhere and somehow there might nevertheless be a basis for the legislation "which would lead reasonable men to conclude that there is just ground for the difference here made." (Slip opinion, at pp. 4-5, quoting from *Lawrence v. State Tax Commission*, 286 U.S. 276, 283).

In support of its conclusion this Court uncritically accepts a contention conceived of and advanced at the last minute by the State of Illinois,—a contention which has no support in the record and none in fact:

“Illinois tells us that the individual personal property tax was discriminatory, unfair, almost impossible to administer, and economically unsound. . . . As respects corporations, the State says, the tax is uniformly enforceable.” (Slip opinion, at p. 9).

In reality, the personal property tax on the *non-business* property of individuals is rather easily administered in practice, and relatively fair and non-discriminatory. Assessment practices do indeed vary from district to district, but that is a fact which causes no administrative problems and little unfairness inasmuch as all personal property taxes are distributed only to taxing bodies within the district wherein they are collected. Each assessing district may well employ its own “rule of thumb” as to how it will assess non-business personal property belonging to individuals, and each such rule may well be deemed somewhat arbitrary. Yet the important thing is that each rule can be, and almost always is, uniformly applied throughout that particular taxing district.⁽⁵⁾

It is only in the case of personal property used in business that the evils of personal property taxation in Illinois truly manifest themselves and give rise to the “scandalous” situation noted by all commentators (See

⁽⁵⁾ Thus, the fact that one-third of Illinois’ citizens (i.e., those residing in Chicago and not engaged in business) pay no personal property taxes at all is not attributable to any administrative difficulties. Nor does it necessarily indicate any unfairness. It merely reflects a political reality which is heeded by the elected taxing officials. The citizens of Chicago prefer that the property tax burden fall upon real estate and business property. In this respect the City of Chicago, and every other Illinois taxing district as well, has traditionally enjoyed a large measure of *de facto* home rule.

Lake Shore's brief on the merits, at p. 44). And here it is perfectly obvious that there is not one whit of difference between the personal property of business corporations and that of unincorporated businesses,—although Article IX-A would tax the former and not the latter.⁽⁶⁾

Lake Shore must respectfully suggest that the Illinois Supreme Court's judgment invalidating the discrimination was not grounded upon any misconception as to the viability of the *Quaker City Cab* case.⁽⁷⁾ In truth, it was based upon an undimmed awareness of the realities which exist in Illinois. The discriminatory taxing pattern established by Article IX-A is palpably arbitrary and invidious. It is wholly lacking in any rational basis.

III.

Suggestions In Support Of Motion To Modify Opinion

(1.) At page 2 of the slip opinion, this Court, referring to the case of *Lehnhausen v. Lake Shore*, states:

"The Circuit Court held Article IX-A unconstitutional as respects corporations by reason of the Equal Protection Clause of the Fourteenth Amendment."

This statement appears to be in error inasmuch as the Circuit Court did not hold Article IX-A unconstitutional in any respect. Rather, that court adopted Lake Shore's position and held that certain provisions of the *Revenue*

⁽⁶⁾ If Article IX-A had simply exempted "non-business" personal property from tax, no constitutional problem would have arisen.

⁽⁷⁾ The only reference to that case in the Illinois Supreme Court's opinion is an extended quotation from a *dissenting* opinion of Justice Brandeis (49 Ill. 2d 137, at p. 150). At all stages of this litigation Lake Shore has readily conceded that *Quaker City Cab* was wrongly decided on its facts.

Act of Illinois were unconstitutional insofar as they purported to impose personal property taxes only on property owned by non-individuals. See App., at p. 8.

(2.) Two typographical errors appear in the slip opinion. In the first line of the first full paragraph on page 2 the name of Lake Shore Auto Parts Co. is misspelled as "Lake Shoe". In the first line on page 3 the citation to the Illinois Supreme Court's opinion is erroneously given as 48 Ill. 2d 137, rather than 49 Ill. 2d 137.

Wherefore, your Petitioner prays that the opinion in this case be modified as hereinabove suggested.

Respectfully submitted,

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Certificate

I hereby certify that I am one of the attorneys of record for Lake Shore Auto Parts Co., Respondent in Case No. 71-685; that I prepared the foregoing Petition For Rehearing; that the said Petition is filed in good faith and not for purposes of delay.

Arnold M. Flamm

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APPENDIX

**Summary Captions Of Points Argued In Brief On
The Merits Filed By The State's Attorney Of
Cook County, Petitioner In No. 71-691**

I.

**STATE COURT SINGULARLY IGNORED, AND FAILED
FOLLOW AND APPLY THE SUBSTANTIVE RULE OF
ESTABLISHED BY THAT COURT, IMPOSED UN-
WITTINGLY, AND INDEED, INVOKED SUA SPONTE BY
THE COURT PRIOR TO THIS CASE. PROPER SUPERVI-
SION BY THIS COURT OF THE STATE JUDICIARY DE-
MANDS THAT THE STATE COURT BE SET ARIGHT. (p. 17)**

II.

**CONSEQUENCE OF THE STATE COURT'S FAILURE
TO APPLY THE ESTABLISHED LAW IN THAT STATE
THE DENIAL BY THAT COURT OF CONSIDERA-
TION OF THE NEW (1970) ILLINOIS CONSTITUTION
WHICH RESULTS IN A CONCLUSION REACHED BY
THE COURT THAT THE PUBLIC POLICY OF THE
STATE OF ILLINOIS FAILED TO SUSTAIN ARTICLE
XII, WHOSE CONSTITUTIONALITY UNDER THE FOUR-
TEENTH AMENDMENT WAS ASSAILED. SUCH FAIL-
URE CONSTITUTES ERROR, OF SUCH GROSS MAGNI-
TITUDE, AS TO COMPEL REVERSAL. (p. 24)**

III.

**OPINION OF THE STATE COURT RESULTS IN THE
DENIAL TO THESE PETITIONERS OF DUE PROCESS OF
LAW AND EQUAL PROTECTION OF THE LAW WITHIN
THE INTENT OF THOSE CLAUSES OF THE FOURTEENTH
AMENDMENT, FOR THE REASON THAT THE PRESENT-
LY STANDING OPINION OF THAT COURT DENIES THESE
PETITIONERS A FAIR TRIAL WITHIN THE DEFINITION
REQUIRED BY THIS COURT. (p. 34)**

Ill. Rev. Stat., Ch. 120, §676.01:

The county collector of each county shall deposit in a special interest-bearing escrow account an amount equal to all payments of ad valorem personal property taxes extended in 1972 against personal property owned by a natural person, or two or more natural persons as joint tenants or tenants in common, and received by him pending final disposition of *Lake Shore Auto Parts v. Korzen*, 49 Ill. 2d 137 (1971). All such payments shall be considered to have been made under protest. Each taxpayer for whom such tax payments are placed in escrow shall be eligible for automatic full repayment from the county collector if such personal property taxes are ultimately held to be invalid, the provisions of Sections 194 and 195 of this Act notwithstanding. No part of the funds deposited in the escrow account may be withdrawn except by the county collector subsequent to final disposition of *Lake Shore Auto Parts v. Korzen*.

Added by P.A. 77-2133, § 1, eff. July 27, 1972.

No. 71-691

SEE No. 71-685.